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REPORTS OF CASES

DETERMINED IN THE

APPELLATE COURTS

OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY DEPARTMENT OF
THE STATE, CORRECTED TO THE FIFTEENTH OF
MARCH, 1900, AND A TABLE OF CASES
REVIEWED BY THE SUPREME COURT
TO THE FIFTEENTH OF
MARCH, 1900**

VOL. LXXXVI

A. D. 1900

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REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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1900

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DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO MARCH 15, 1900.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mt. Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

ISAAC N. PHILLIPS.....Bloomington.

JUSTICES.

First District—CARROLL C. BOGGS.....Fairfield.
Second District—JESSE J. PHILLIPS.....Hillsboro.
Third District—JACOB W. WILKIN.....Danville.
Fourth District—JOSEPH N. CARTER.....Quincy.
Fifth District—ALFRED M. CRAIG.....Galesburg.
Sixth District—JAMES H. CARTWRIGHT.....Oregon.
Seventh District—BENJAMIN D. MAGRUDER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERKS.

CHRISTOPHER MAMER, Northern Grand Division, 158 Throop St., Chicago.
ALBERT D. CADWALLADER, Central Grand Division, Lincoln.
JACOB O. CHANCE, Southern Grand Division, Mt. Vernon.

The terms of office of these clerks expire 1902, after which time, under the act of 1897, but one clerk will be elected. The present clerks continue in charge of the records of their respective grand divisions as though said grand divisions had not been consolidated. All records, files, dockets and papers of their respective offices are now kept at the State House in Springfield.

(2) APPELLATE COURTS.

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

REPORTER.

MARTIN L. NEWELL,Springfield.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

NATHANIEL C. SEARS, Presiding Justice, Ashland Block, Chicago.

FRANCIS ADAMS, Justice, Ashland Block, Chicago.

THOMAS G. WINDES, Justice, Ashland Block, Chicago.

BRANCH APPELLATE COURT.*

FIRST DISTRICT.

OLIVER H. HORTON, Presiding Justice, Ashland Block, Chicago.

HENRY M. SHEPARD, Justice, Ashland Block, Chicago.

HENRY V. FREEMAN, Justice, Ashland Block, Chicago.

APPELLATE COURTS—(CONTINUED.)

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

JOHN D. CRABTREE, Presiding Justice, Dixon.

DORRANCE DIBELL, Justice, Joliet.

HARRY HIGBEE, Justice, Pittsfield.

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.

Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.

CLERK—W. C. Hippard, Springfield.

FRANCIS M. WRIGHT, Presiding Justice, Urbana.

OLIVER A. HARKER, Justice, Carbondale.

BENJAMIN R. BURROUGHS, Justice, Edwardsville.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statute, 1897, 508, Laws of 1897, 183.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tuesday in February and August.
CLERK—Frank W. Havill, Mount Vernon.

NICHOLAS E. WORTHINGTON, Presiding Justice, Peoria.
JAMES A. CREIGHTON, Justice, Springfield.
HIRAM BIGELOW, Justice, Galva.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBERTS, Cairo.
OLIVER A. HARKER, Carbondale.
ALONZO K. VICKERS, Vienna.

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon.
PRINCE A. PEARCE, Carmi.
ENOCH E. NEWLIN, Robinson.

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville.
MARTIN W. SCHAEFER, Belleville.
WILLIAM HARTZELL, Chester.

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia.
TRUMAN E. AMES, Shelbyville.
SAMUEL L. DWIGHT, Centralia.

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris.
FERDINAND BOOKWALTER, Danville.
FRANK K. DUNN, Charleston.

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana.
EDWARD P. VAIL, Decatur.
WILLIAM G. COCHRAN, Sullivan.

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield.
ROBERT B. SHIRLEY, Carlinville.
OWEN P. THOMPSON, Jacksonville.

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy.
HARRY HIGBEE, Pittsfield.
THOMAS N. MEHAN, Mason City.

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth.
GEORGE W. THOMPSON, Galesburg.
JOHN A. GRAY, Canton.

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria.
THOMAS M. SHAW, Lacon.
NICHOLAS E. WORTHINGTON, Peoria.

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
JOHN H. MOFFETT, Paxton.

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet.
ROBERT W. HILSCHER, Watseka.
JOHN SMALL, Kankakee.

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa.
HARVEY M. TRIMBLE, Princeton.
SAMUEL C. STOUGH, Morris.

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva.
WILLIAM H. GEST, Rock Island.
FRANK D. RAMSAY, Morrison.

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon.
JAMES SHAW, Mount Carroll.
JAMES S. BAUME, Galena.

Sixteenth Circuit.—The counties of Kane, Du Page, De Kalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin.
CHARLES A. BISHOP, Sycamore.
GEORGE W. BROWN, Wheaton.

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford.
CHARLES E. FULLER, Belvidere.
CHARLES H. DONNELLY, Woodstock.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit, and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi criminal cases only, and the judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cooke, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANECY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—John A. Linn, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,
THEODORE BRENTANO,
PHILIP STEIN,
JESSE HOLDOM,
JONAS HUTCHINSON,
AXEL CHYTRAUS,

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
NATHANIEL C. SEARS,
FARLIN Q. BALL,
JOSEPH E. GARY.
MARCUS KAVANAGH.*

*Appointed to fill vacancy December 3, 1896.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 87, R. S., and when so established have concurrent jurisdiction within the city, with the Circuit Courts, in all civil and criminal cases, except treason and murder, and in appeals from justices of the peace residing within the city. (*Hercules Iron Works v. E., J. & E. Ry. Co.*, 141 Ill. 497.)

THE CITY COURT OF ALTON.

ALEXANDER W. HOPE, Judge. FRANCIS BRANDEWEIDE, Clerk.

THE CITY COURT OF AURORA.

RUSSELL P. GOODWIN, Judge. WM. FLETCHER FOWLER, Clerk.

THE CITY COURT OF CANTON.

W. H. HEMENOVER, Judge. A. T. ATWATER, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

SILAS COOK, Judge. THOMAS J. HEALY, Clerk.

THE CITY COURT OF ELGIN.

RUSSELL P. GOODWIN, Judge. JOHN J. KELLY, Clerk.

THE CITY COURT OF LITCHFIELD.

AMOS OLLER, Judge. HUGH HALL, Clerk.

THE CITY COURT OF MATTOON.

JAMES F. HUGHES, Judge. T. M. LYTLE, Clerk.

(6) COUNTY AND PROBATE COURTS.

In the counties of Cook, La Salle and Peoria, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72.)

JUDGES.	COUNTIES.	COUNTY SEATS.
CARL E. EPLER.....	Adams.....	Quincy.
WM. S. DEWEY.....	Alexander.....	Cairo.
JOSEPH STORY.....	Bond.....	Greenville.
WM. C. DE WOLF, JR.	Boone.....	Belvidere.
R. E. VANDEVENTER.....	Brown.....	Mt. Sterling.
RICHARD M. SKINNER.....	Bureau.....	Princeton.
ANDREW J. EMERICK.....	Calhoun.....	Hardin.
ALVA F. WINGERT.....	Carroll.....	Mt. Carroll.
JOHN F. ROBINSON.....	Cass.....	Virginia.
CALVIN C. STALEY.....	Champaign.....	Urbana.
RUFUS M. POTTS.....	Christian.....	Taylorville.
J. C. PERDUE.....	Clark.....	Marshall.
JOHN R. BONNEY.....	Clay.....	Louisville.
JOSEPH HANKE.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
ORRIN N. CARTER.....	Cook.....	Chicago.
* Pro. Judge.		Chicago.
AUSBY L. LOWE.....	Crawford.....	Robinson.
ELIAS MCPHERSON.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
GEO. K. INGHAM.....	DeWitt.....	Clinton.
WM. H. BASSETT.....	Douglas.....	Tuscola.
JOHN H. BATTEN.....	DuPage.....	Wheaton.
STEPHEN I. HEADLEY.....	Edgar.....	Paris.
WM. MCGREGOR.....	Edwards.....	Albion.
DAVID L. WRIGHT.....	Effingham.....	Effingham.
GEO. T. TURNER.....	Fayette.....	Vandalia.
ALEXANDER MCELROY.....	Ford.....	Paxton.
WM. H. HART.....	Franklin.....	Benton.
MEREDITH WALKER.....	Fulton.....	Lewistown.
GEORGE HANLON.....	Gallatin.....	Shawneetown.
DAVID F. KING.....	Greene.....	Carrollton.
A. R. JORDON.....	Grundy.....	Morris.
CHAS. B. THOMAS.....	Hamilton.....	McLeansboro.
CHELLIS E. HOOKER.....	Hancock.....	Carthage.
WM. J. HALL.....	Hardin.....	Elizabethtown.
RAUSELDON COOPER.....	Henderson.....	Oquawka.
CHESTER M. TURNER.....	Henry.....	Cambridge.
FRANK HARRY.....	Iroquois.....	Watseka.
ROBERT J. MCELVAIN.....	Jackson.....	Murphysboro.
I. D. SHAMHART.....	Jasper.....	Newton.
JOSEPH D. NORRIS.....	Jefferson.....	Mt. Vernon.
ALLEN M. SLATEN.....	Jersey.....	Jerseyville.
WM. T. HODSON.....	Jo Daviess.....	Galena.
O. R. MORGAN.....	Johnson.....	Vienna.
M. O. SOUTHWORTH.....	Kane.....	Geneva.
EBEN B. GOWER.....	Kankakee.....	Kankakee.
HENRY S. HUDSON.....	Kendall.....	Yorkville.
PHILIP S. POST.....	Knox.....	Galesburg.
DEWITT L. JONES.....	Lake.....	Waukegan.

*Office vacant. The Hon. JOHN H. BATTEN is at present acting as Probate Judge.

JUDGES.	COUNTIES.	COUNTY SEATS.
HENRY W. JOHNSON.....	LaSalle	Ottawa.
ALBERT T. LARDIN, Pro. J....	LaSalle	Ottawa.
JASPER D. MADDING.....	Lawrence	Lawrenceville.
RICHARD S. FARRAND.....	Lee	Dixon.
CHAS. M. BARICKMAN.....	Livingston	Pontiac.
EMIL C. MOOS.....	Logan	Lincoln.
WM. L. HAMMER.....	Macon	Decatur.
DAVID E. KEEFE.....	Macoupin	Carlinville.
WM. P. EARLY.....	Madison	Edwardsville.
CHAS. H. HOLT.....	Marion	Salem.
B. W. WRIGHT.....	Marshall	Lacon.
JAMES A. MCCOMAS.....	Mason	Havana.
GEORGE SAWYER.....	Massac	Metropolis.
J. ROSS MICKEY.....	McDonough	Macomb.
ORSON H. GILLMORE.....	McHenry	Woodstock.
ROLAND A. RUSSELL.....	McLean	Bloomington.
FRANK E. BLANE.....	Menard	Petersburg.
WILLIAM T. CHURCH.....	Mercer	Aledo.
PAUL C. BREY.....	Monroe	Waterloo.
M. J. MCMURRY.....	Montgomery	Hillsboro.
CHARLES A. BARNES.....	Morgan	Jacksonville.
JOHN D. PURVIS.....	Moultrie	Sullivan.
FRANK E. REED.....	Ogle	Oregon.
ROBERT H. LOVETT.....	Peoria	Peoria.
M. M. BASSETT, Pro. Judge...	Peoria	Peoria.
R. W. S. WHEATLEY.....	Perry	Pinckneyville.
F. M. SHONKWILER.....	Piatt	Monticello.
B. F. BRADBURN.....	Pike	Pittsfield.
WM. A. WHITESIDE.....	Pope	Golconda.
JOHN D. BRISTOW.....	Pulaski.....	Mound City.
JOHN M. McNABB.....	Putnam	Hennepin.
WARREN N. WILSON.....	Randolph.....	Chester.
PARKE HUTCHINSON.....	Richland	Olney.
LUCIAN ADAMS	Rock Island.....	Rock Island.
JOHN L. THOMPSON.....	Saline	Harrisburg.
GEORGE W. MURRAY.....	Sangamon	Springfield.
H. V. TEEL.....	Schuyler.....	Rushville.
JAMES CALLANS.....	Scott.....	Winchester.
THOMAS RIGHTER.....	Shelby	Shelbyville.
WM. W. WRIGHT.....	Stark	Toulon.
FRANK PERRIN.....	St. Clair.....	Belleville.
WM. N. CRONKRITE.....	Stephenson.....	Freeport.
GEO. C. RIDER.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union	Jonesboro.
M. W. THOMPSON.....	Vermilion.....	Danville.
LYMAN LEEDS.....	Wabash.....	Mt. Carmel.
T. G. PEACOCK.....	Warren	Monmouth.
GEO. VERNOR.....	Washington.....	Nashville.
L. E. SUNDERLAND.....	Wayne	Fairfield.
JOHN N. WILSON.....	White	Carmi.
HENRY C. WARD.....	Whiteside.....	Morrison.
ALBERT O. MARSHALL.....	Will	Joliet.
WILEY F. SLATER.....	Williamson	Marion.
RUFUS C. BAILEY.....	Winnebago.....	Rockford.
THOMAS KENNEDY.....	Woodford.....	Eureka.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1898.

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West Chicago St. R. R. Co. v. Bernhard Kromshinsky.

1. *EVIDENCE—Introduction of Trip-Sheet.*—It is not error to allow a street car conductor, when called as a witness, to refresh his memory by referring to a trip-sheet made by him, in obedience to a rule of the company, on the night of the injury.

Action in Case, for personal injuries. Appeal from the Circuit Court of Cook County: the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. **Affirmed.** Opinion filed December 5, 1899.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

C. HEIMER JOHNSON, attorney for appellee; JOHN F. WATERS, of counsel.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was brought to recover damages for personal injuries. The injury to appellee was caused by his falling or being "jerked" off of the middle car of a train of street cars. The attorney for appellant states in his brief that the following are the errors complained of, viz. :

I.

"The court erred in denying defendant's motions to exclude the evidence and in refusing to give its peremptory instructions as requested.

II.

The court erred in denying defendant's motion for a new trial on the ground that the verdict is against the law and the evidence and the weight of evidence.

III.

The court erred in giving two of the instructions given at the request of the plaintiff.

IV.

The court erred in excluding the trip-sheet offered in evidence by the defendant."

First. There was no error by the trial court in refusing to instruct the jury to find the appellant not guilty. The evidence was such that it would have been improper and erroneous for the trial judge to have thus taken the case from the jury.

Second. The motion for a new trial was upon the theory that the verdict is against the law and the evidence and the weight of evidence. The testimony was in some respects conflicting. Referring to the testimony of two of the witnesses as to the speed at which the train was running, attorney for appellant in his brief says, "It is impossible to reconcile the testimony of these two witnesses." The testimony is also conflicting as to what caused appellee to fall so that he was injured. It is the same as to whether the car upon which appellee was riding was a closed or an open car.

The verdict of the jury is not so against the weight of evidence as that this court would be warranted in setting it aside. We are not prepared to say that it is not in accordance with the weight of evidence. As we have before had occasion to say, it is not necessary to review the testimony at length and in detail. To do so would serve no good purpose as a guide or aid in the trial of other cases.

Third. Did the court err in giving instructions asked by appellee? The instruction especially complained of is this:

"1. The court instructs the jury that it is the duty of a railroad company to exercise the highest degree of care and caution consistent with the practical operation of the road for the safety and security of passengers while being transported."

It was not error to give that instruction. The appellant was a railroad company and the appellee was a passenger. The rule as to the duty of the appellant is correctly stated. Appellant, however, contends that this instruction is erroneous because it does not also instruct the jury as to due care on the part of the passenger. It is also contended that "It is not enough to say that the question of the plaintiff's care was submitted by other instructions." Such contentions can not be sustained. The jury was fully instructed upon this question, just as requested by appellant. The instructions, when considered together, as they should be, present the question as fully and as favorably to the appellant as it was entitled to have them. Appellant's instructions alone occupy nine pages of the printed abstract.

Fourth. Did the trial court err in excluding the trip-sheet offered in evidence by the appellant?

It is urged that it was a question of some importance at the trial as to whether the car upon which appellee had been riding, and from which he fell, was an open or a closed car. To support appellant's contention it offered in evidence what is called a trip-sheet. Its admission was objected to and the objection was sustained. It is urged that said trip-sheet was made by the conductor in obedience to a rule of the appellant company. It is not a record required by law.

The conductor who prepared the trip-sheet was called as a witness. He said that he prepared the sheet the night that appellee was injured. It was handed to him when he was testifying. With the sheet before him he testified to the number of the car, without objection. There was no

testimony tending to show that the trip-sheet was not as the conductor testified. It does not appear that there was anything more upon the trip-sheet that was important in this case. It being a statement in writing, made by the witness at the time, it was competent for him to examine it for the purpose of refreshing his memory. That he did, and testified positively to all that there was in the trip-sheet that was pertinent to the question for which it was offered in evidence. It was not error to exclude it.

Appellee's foot was amputated in consequence of the injury complained of. The damages are not excessive. No reason is apparent why he should not recover the amount of the verdict in this case.

The judgment of the Circuit Court is affirmed.

**People ex rel. Ethel May Hickey v. Melissa L. Hickey
and W. Vance Harrison.**

1. **CHILDREN OF DIVORCED PARENTS—*Care and Custody.***—The statute of this State, with regard to the care and custody of children of divorced persons, gives the court the power, when called upon to award such care and custody, to make such order as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just, and in the determination of such cases, the interests and welfare of the child are the supreme and controlling considerations with the court.

2. **SAME—*When the Mother Takes the Precedence.***—An infant of tender years is generally left with the mother (if no objection to her is shown to exist), even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires and which it is the peculiar province of the mother to supply, and this rule will apply with much force in cases of female children of a more advanced age.

3. **SAME—*Effect of Decrees upon the Custody of Children.***—A decree awarding the custody of a child is *res judicata*, concluding the question. But it does not conclude the question for all time, since new facts may create new issues.

4. **FOREIGN DECREES—*Status of Parent and Child.***—The relation of parent and child is a *status* rightfully, like marriage, regulated by the State in which the parties are domiciled. The order of one State

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does not operate as an estoppel of all future inquiry in the courts of another State wherein the child has acquired a domicile.

5. *SAME—Where a Foreign Decree is Void.*—Where a decree is *ex parte* against a father who, with his child, was domiciled in another State, the decree for custody is without jurisdiction, and therefore void.

Habeas Corpus.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899.

ROBERTS & ROBERTS, attorneys for appellant.

Where a final decree for divorce and alimony is rendered by a court of competent jurisdiction in one State, the Constitution of the United States requires that full faith and credit be given to it in every other State. The said decree and judgment should have the same force and effect in the other States as the decree and judgment would have by the usages and customs of the State where it is rendered. *Dow v. Blake*, 148 Ill. 76; *Knowlton v. Knowlton*, 155 Ill. 158; U. S. Con., Art. 4, Sec. 1; Rev. Statutes U. S., Sec. 905; *Slack v. Perrine*, 9 Appeal Cases Dist. of Col. 128; *Laing v. Rigney*, 160 U. S. 531.

The decree of divorce and custody, or a decretal order in habeas corpus proceedings, filed for the purpose of establishing the custody of a child, are final, and even if erroneous, will be considered conclusive of all matters that were or might have been offered in behalf of the parties therein, unless the same is reversed on appeal. *Slack v. Perrine*, 9 Appeal Cases D. C., 154 and 155; *Laing v. Rigney*, 160 U. S. 531.

The Supreme Court of this State has in no case extended any courtesy to a woman or a man by giving either of them the custody of minor children of tender years where it has been proven that either the husband or the wife was an adulterer or an adulteress. *Miner v. Miner*, 11 Ill. 43; *Hewitt v. Long*, 76 Ill. 399.

The writ of habeas corpus is the proper, and, in fact, the only remedy accorded by law in a case, such as the one now at bar, by which a parent legally entitled to the cus-

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tody of his minor child may obtain the custody thereof. Hurd on Habeas Corpus, Chap. 9, Sec. 3, p. 453; Church on Habeas Corpus, Sec. 423; People v. Mercein, 3 Hill, 399; 23 Wend. 64; Regina v. Clark, 40 Eng. L. & Eq. 114, 2 Kent Com. 194.

PEASE & ALLEN and LOUIS J. PIERSON, attorneys for appellees.

A judgment rendered in one of the United States on notice by publication only, is not final nor conclusive against the defendant, who was not resident, and not within the jurisdiction of the court at any time pending the suit, nor when the judgment was rendered therein. It may be shown in an action in this State on a foreign judgment thus rendered, that the defendant was not within the State in which the judgment was rendered during such time, and did not appear in the cause by attorney. Such a judgment has no extra-territorial force, and is a nullity. *Bimeler v. Dawson*, 4 Scam. 543; *Smith v. Smith*, 17 Ill. 482; *Sim v. Frank*, 25 Ill. 125; *Black on Judgments*, Vol. 1, Sec. 218; *Thompson v. Whitman*, 18 Wall. 459; *Wharton on Evidence* (2d Ed.), Sec. 796; *Pennoyer v. Neff*, 95 U. S. 714-727.

In habeas corpus proceedings for the custody of a minor child the court is not bound by merely the legal rights of a parent or guardian, but will consider what is for the best interests of the child. The welfare of the child is the paramount and controlling fact to be considered by the court. *Green v. Campbell*, 35 W. Va. 702; *Armstrong v. Stone*, 9 Gratt. 102-107; *Church on Habeas Corpus*, Secs. 440-442; *Richards v. Collins*, 45 N. J. Eq. 284-287; *People v. Porter*, 23 Ill. App. 196; *Chapsky v. Wood*, 26 Kan. 650; *Clark v. Bayer*, 32 Ohio St. 299.

MR. JUSTICE WINDES delivered the opinion of the court.

Thomas Hickey, in the name of the people, on the relation of Ethel May Hickey, his daughter, aged seven years, brought habeas corpus against appellees in the Cook County Circuit Court to have the custody of said Ethel taken from

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her mother, the appellee, Melissa L. Hickey, and awarded to him.

Thomas Hickey, on November 29, 1897, obtained a divorce in the State of New Jersey from the appellee, Melissa L. Hickey, on the charge of adultery with William Vance Harrison, and was by the same decree awarded the custody of said Ethel.

Thomas and Melissa L. Hickey were married in 1884, and at the time the bill for divorce was filed the said Ethel was their only child, who resided with her mother in Cook county, Illinois. Melissa L. Hickey was not personally served with process from the New Jersey court, nor did she appear in the divorce proceeding, though she was, pursuant to a statute of the State of New Jersey then in force, authorizing such a proceeding, served with notice of an order entered by the New Jersey court in said divorce proceeding, directing her to appear, plead, demur or answer the bill therein, or that in default thereof such decree might be made against her as the chancellor might think equitable. The same statute of New Jersey provides that "any defendant upon whom such notice is served, as herein directed, shall be bound by the decree in such case as if he were served with process in this State." Melissa L. Hickey and the child Ethel were residing in said Cook county at the time said bill was filed, when said notice was served upon said Melissa and at the time the petition in this case was filed. She was at no time after the commencement of the divorce proceeding within the State of New Jersey.

Melissa J. Hickey and the appellee Harrison, prior to the said decree of divorce, lived together as husband and wife in Cook county, Illinois, but since the decree have been married, and were, at the time of the filing of the petition in this case, living together as husband and wife and had the custody and control of said Ethel, who had lived with them as their child from the month of May, 1897, when the child was clandestinely taken by its mother from the home of its grandmother in New Jersey and brought to the home of the former in Illinois.

The appellees answered the petition for habeas corpus and produced the child before the court. The issues were made and a hearing had before the Circuit Court, which resulted in an order remanding the child to the custody of its mother and said Harrison, and directing that the father should have the right at all reasonable times to see and converse with the child. From this order the appeal herein is taken.

After hearing the evidence produced upon the trial, consisting of the record of the proceedings in the New Jersey court and the testimony of witnesses with regard to the character and fitness of both the father and the mother of said child to have its care and custody, and of their respective ability and capacity to properly care for, educate and maintain her, the learned judge, in deciding the case said, in part, as follows :

"Neither of the parents have been such in the past as to commend themselves to anybody very highly, but I am not going to review the past of either of them. I shall assume that both of them have, without regard to what their past has been, intended to abstain from them so that either would be capable of taking care of this child. I think today that either one of them would take proper care and are capable of giving this child fair care and treatment, that is, I do not think the child would go very wrong if taken care of by either of them. I think that the mother is better capable of taking care of a little girl at her age than the father. This child is a very bright and intelligent little girl, as bright, probably, as any child you will find in a hundred, and the child says she would rather live with her mother than anybody else, and I have not any doubt of that from the examination I have made of the child, and I think, regardless of what the mother has been in the past, she is now living a reputable life. There is no evidence here that there ever was any misconduct with anybody except this man who is now her husband. Whether or not, the misconduct that she was guilty of with this man before he became her husband, it is immaterial for me to determine or to decide here. They are now man and wife, living respectably and respected by the neighbors in the community in which they live. They have apparently taken good care of this child, and I shall leave the child with the mother."

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A careful reading and examination of the evidence in the record has led us to the same conclusion of the trial court with reference to the custody of the child. The evidence shows that the father is a steady, industrious and respectable man of good standing in the community where he lives—Trenton, N. J.—and that he earns about one thousand dollars per annum, and that his mother, to whose home he proposed to take the child and keep her, was a proper person to have the care of the child, though she was sixty years of age, a widow, and did not appear to be especially anxious to take the child into her home.

The language of the trial judge, with regard to the appellees and the child, above quoted, is amply sustained by the evidence, and we are unable to say that the result reached by the court and the order entered by him was not a proper disposition of the custody of the child and for its best interests.

The statute of this State, with regard to the care and custody of children of divorced persons, gives the court the power, when called upon to award such care and custody, to make such order "as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just;" and it has been held by the Supreme Court that in the determination of such cases the interests and welfare of the child are the supreme and controlling considerations with the court. In *Miner v. Miner*, 11 Ill. 43-9, it was said, in speaking of this consideration, that "an infant of tender years is generally left with the mother (if no objection to her is shown to exist) even when the father is without blame, merely because of his inability to bestow upon it that tender care which nature requires, and which it is the peculiar province of the mother to supply. This remark will apply with much force in cases of female children of a more advanced age." The court then proceeds to show why this is so, and awards the custody of a girl seven or eight years old to its mother.

In *Umlauf v. Umlauf*, 128 Ill. 378, the same doctrine was affirmed, and the mother was awarded the custody of her

boy, between six and seven years old, although the divorce was granted for her fault, and the father was found by the court to be a fit person to have the child's custody, care and tuition.

It is contended, however, on behalf of the father, that the decree of the New Jersey court as to the custody of the child Ethel is *res adjudicata* and binding upon the parties, and should be given the same effect by the courts of Illinois as in New Jersey. The case of Laing v. Rigney, 160 U. S. 531-9, is especially relied upon as sustaining this contention. It is true that in that case it was held that a decree for alimony rendered in a New Jersey court under a service had similar to the service in the case at bar, was binding upon the defendant in the State of New York. The decision is good law and is sustained, in our opinion, by the weight of authority, but it is not applicable to the question here presented, viz., whether such a decree is *res adjudicata* and binding upon the question of the custody of the child of the divorced parties.

Mr. Bishop in his work on Marriage, Div. & Sep., Sec. 1189, Vol. 2, in speaking of the binding force of a foreign custody order, says:

"The true rule in the State of its rendition is, that it is *res judicata*, concluding the question. But it does not conclude the question for all time, since new facts may create new issues. Nor, since the relation of parent and child is a *status* rightfully, like marriage, regulated by any State in which the parties are domiciled, does the order in one State operate as an estoppel of all future inquiry in the courts of another State wherein the child has acquired a domicile. * * * If the divorce was *ex parte* against a father who, with his child, was domiciled in another State, the decree for custody would be without jurisdiction, and therefore void."

In Nelson on Div. and Sep., Sec. 980, Vol. 2, the author, in speaking of the effect of such an order of custody, says:

"Such an order is not, however, *res judicata* as to the right of the State to determine the custody of the child. The decree of another State may be binding as to the parties, but the courts of each State will have the right to deter-

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mine anew who shall be entitled to the custody of the child, and where its welfare requires, the courts of the latter State may commit the custody of a child to a third person."

The following authorities fully sustain the law as laid down by the text writers: Kline v. Kline, 57 Ia. 386; Avery v. Avery, 33 Kan. 1-6; Kentzler v. Kentzler, 3 Wash. St. 166; Harris v. Harris, 20 S. E. Rep. (N. C.) 187; People v. Allen, 105 N. Y. 628; Thorndyke v. Rice, 24 Law Rep. 19.

It is also contended by appellant that because the appellees were shown to be guilty of adultery, that fact should be conclusive as against leaving the custody of the child with its mother. This, no doubt, is a very important consideration, but in connection with it is another matter of grave import, and that is that it is sought to take the child permanently beyond the jurisdiction of the Illinois court. We can not say that the learned trial judge was manifestly wrong in leaving the child with its mother. It was not shown that she ever was guilty of adultery with any one except the appellee Harrison, who is now her husband, and they are living respectably and are respected by their neighbors in the community in which they live, and have taken good care of the child. So far as the evidence shows, the child has been kept at school, and has attended Sunday school. The child herself is unusually bright and intelligent for one of her years, and when examined by the court says she would rather live with her mother than any one else. The mother's devotion to the child is shown by the fact that she made a journey from Illinois to New Jersey, and in the night time took the child from the home of its grandmother and brought it to her own home in Illinois.

The order of the Circuit Court is affirmed.

John McKechney v. The Columbian Powder Co.

1. **QUESTIONS OF FACT—On Contradictory Evidence.**—It is peculiarly within the province of the jury to settle disputed questions of fact.

2. EVIDENCE—*Statements of Counsel—Admissions.*—In an action for goods sold and delivered, counsel, in opening his case, stated that it was admitted by the defendant that the plaintiff had a claim for six thousand pounds of dynamite at eleven cents a pound, amounting to \$660, and the counsel for the defendant replied: "We do not admit that you are entitled to that amount of money. We admit that amount of powder was furnished at the canal, but *we have an offset against it.*" Then, without objection, plaintiff offered in evidence the bills for the dynamite and rested. *Held* sufficient, as an admission that there was no controversy over the delivery, quantity or price of the dynamite referred to, and as dispensing with the necessity of proof upon these points.

Assumpsit, for goods sold and delivered. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed December 5, 1899.

L. D. CONDEE, attorney for appellant.

GOLDZIER & RODGERS, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit in assumpsit brought by appellee against appellant and others, to recover for goods sold and delivered. Appellant was the only one served with process, and prosecutes this appeal.

The first point upon which appellant relies as ground for reversal, is the alleged failure to prove the price for which the sale of the powder or dynamite in controversy was made.

It was admitted on the trial that appellee delivered this six thousand pounds of dynamite, but it is claimed that no competent evidence was introduced to show the terms of the sale as to price. It appears from the record, however, that appellee's counsel, in substance, stated when opening the case that it was admitted by the defendant (appellant) that appellee had a claim for six thousand pounds of dynamite at eleven cents a pound, amounting to six hundred sixty dollars. Thereupon, appellant's counsel replied: "We do not admit that you are entitled to that amount of

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money. We admit that amount of powder was furnished at the canal, *but we have an offset against it.*" Without objection appellee then offered in evidence the bills for the dynamite and rested.

We regard the statement of appellant's counsel as an admission that there was no controversy over the delivery, quantity or price of the dynamite referred to, and as dispensing with the necessity of proof upon those points. It was substantially a concession that the only defense appellant could urge or desired to urge was that he had an offset.

It is contended in the second place that no allowance was made appellant for money which, it is said, was shown by a certain receipt to have been paid upon appellee's claim.

This receipt shows the payment of four hundred eighty-four dollars and three cents, "subject to adjustment." While these words tend to show an unadjusted account between the parties, the receipt does not show that the money mentioned herein was paid upon the claim now in controversy. It merely indicates that appellant had paid, and appellee received, the sum of money specified, and that there were still unadjusted matters between them, notwithstanding such payment.

It is urged in the third place that the evidence shows a part of the powder in controversy to have been removed by appellee after its delivery, for which no allowance was made.

The evidence upon this point is contradictory and unsatisfactory. There is testimony to the effect that thirty-seven cases were hauled away by an express wagon which the witness says was from appellee. This is denied by witnesses for appellee. It was peculiarly within the province of the jury to settle this disputed question of fact. We think the evidence justified their conclusion.

The judgment of the Superior Court must be affirmed.

Merle & Heaney Mfg. Co. v. Ellen McNulty.

1. **VERDICTS**—*Conclusive on Questions of Fact.*—It is for the jury to settle questions of fact, and a verdict is, as a general rule, conclusive.

Trespass.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

CUTTING, CASTLE & WILLIAMS, attorneys for appellant.

BOWLES & BOWLES, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee brought suit in case against appellant, for entering her premises, by its agents, and carrying away her goods, to wit, one cash register, the property of appellee, of the value of \$125, and recovered a verdict and judgment for \$139.

It is not disputed that appellant, by its servants, took the cash register in question from appellee.

By one of its pleas, appellant sought to justify its taking of the register under the terms of a chattel mortgage given to secure its purchase price of \$125, upon which a balance of \$10 was claimed to be due. Appellee joined issue upon that plea by denying that anything remained unpaid upon the mortgage, and the case was tried upon such issue.

The question was purely one of fact, and appellant argues only such of its assignments of error as reach the point that the verdict was contrary to the evidence. Whether the debt secured by the mortgage was fully paid, or not, is narrowed down to the single consideration as to whether a receipt for \$10.05, given by appellant to appellee, at a time when one of the notes was paid but not surrendered, represented the same sum of money that the note did or not, both the note and receipt being in the possession of appellee.

So far as the evidence alone is concerned the preponderance may be fairly said to be on the side of the appellee,

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although there are some strong inferences in aid of the evidence on the side of appellant. Indeed, the argument that is made for a reversal of the judgment rests strongly upon such inferences.

There is, however, one inference not without weight, in support of appellee's contention that she paid the full amount of the mortgage, viz.: that while all but the last \$10 of the debt, of which all but \$2 was payable in monthly installments, was paid at or about the maturity of the several notes evidencing the debt, no steps were taken to collect the last \$10 until some ten months after \$8 of it had become due.

But it is not for us to say where the exact truth lies. The jury have settled that question, and no error being claimed in other respects the judgment will be affirmed.

Independent Order of Foresters v. Flora Haggerty.

1. **BENEFICIARY ASSOCIATIONS—Construction of By-laws.**—The province of section 9 of the by-laws of the Independent Order of Foresters of the State of Illinois, which provides for dropping a member from the order, is not self-executing, but requires affirmative action by the order.

2. **SAME—Waiver of Suspensions.**—The suspension of a member of a beneficiary association for non-payment of assessments is waived, and he again becomes a member in good standing, by the payment of his delinquent dues and assessments, and the acceptance of them by the order, without any other action on the part of the order except the accepting of the payment.

Assumpsit, on a beneficiary association. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899.

Statement.—On August 10, 1891, Robert Haggerty, being a member of Court Elsdon, No. 256, of the Independent Order of Foresters of the State of Illinois, the high court issued to him a certain endowment certificate, whereby it

promised to pay to Flora Haggerty, his wife, the sum of \$1,000, upon satisfactory evidence of the death of said member, providing said member was in good standing in the order at the time of his death, and also, among further conditions, that the said member would comply in the future with the laws, rules and regulations then governing the said order, or that might thereafter be enacted by the high court.

On November 14, 1893, said Court Elsdon forfeited its charter, and on November 12, 1893, a card signed by the high chief ranger and high secretary of said order was issued to Robert Haggerty, as follows:

"To whom it may concern: This is to certify that Brother Robert Haggerty, whose name is written by himself upon the margin of this card, was formerly a member of the late Court Elsdon, No. 256, I. O. F., which forfeited its charter on November 14, 1893; that he is now on the high secretary's books as a member at large, and upon proof of identification and being in possession of a receipt for the last assessment is entitled to the fraternal courtesies of the order."

Robert R. Haggerty died on December 14, 1896. On November 2, 1898, Flora Haggerty, as beneficiary, commenced this action against the high court of the Independent Order of Foresters of the State of Illinois, for the recovery of \$1,000, being the amount set forth in the endowment certificate.

To the declaration of the plaintiff the defendant filed the plea of the general issue, and the following notices of defenses under said issue:

First. That on the 14th day of December, A. D. 1896, the said Robert R. Haggerty was not a member of the defendant order.

Second. The said Robert R. Haggerty was dropped from membership in the said order on account of failure on his part to pay dues and assessments due to said order on account of said membership, and on account of said certificate herein sued on, more than two months before the date of the death of said Robert R. Haggerty.

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Third. That long before his death, to wit, about two months, said Robert R. Haggerty was dropped from membership in the said order for having failed to comply with the rules, regulations and by-laws of said order pertaining to the payment of dues and assessments to said defendant order.

Fourth. That long before his death, to wit, about two months, said Robert R. Haggerty forfeited his membership in said order because of having failed to comply with the rules, regulations and by-laws of said order, pertaining to the payment of dues and assessments to said defendant order.

The endowment certificate was introduced in evidence, and the death of Robert R. Haggerty on December 14, 1896, was shown.

The cash book and ledger of the appellant order, introduced in evidence by appellant, show that the last payment made by Robert R. Haggerty was on August 31, 1896, and amounted to sixty-two cents, and was in liquidation of assessment No. 211, and that he was marked suspended for non-payment of assessment No. 212.

An employe, as clerk of the appellant order, testified :

“I marked ‘suspended’ in the ledger. I did that of my own accord, in the line of duties as a clerk. I was instructed by the High Secretary. I never got any instructions from the High Board of Directors. I was ordered by the High Secretary. I did not get orders every day. I had no instruction of that individual suspension. I had instructions from Mr. Saunders that on the first of every month that every one who had not one full assessment to their credit was to be marked suspended. I received those instructions when I took charge of this book, some time prior to October, 1896.”

On October 1, 1896, Robert R. Haggerty was marked “suspended” on the books of the defendant order.

The following letter was introduced in evidence, written by appellee to the financial secretary of the appellant order :

“CHICAGO, Oct. 4th, 1896.

MR. SAUNDERS :

SIR : My husband has been out of the city several weeks trying to find work. Therefore I am left entirely

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alone with three children. I had intended to pay what I owed last week, but the morning I had made arrangements to go my child was taken with diphtheria, and have been up night and day ever since. Please give this your personal attention till I have an opportunity to straighten it and get a card of withdrawal.

Yours truly,

MRS. HAGGERTY."

The following receipt was introduced in evidence :

" No.	DEC. 12, 1896.
BRO. ROBT. HAGGERTY,	
Dr. to Court M. at large, No. I. O. F.	
To assessment No. 212, 13, 14, 15, 16, 17,	_____
" dues to, 189	\$3 72
" arrears, per capita tax, Dec. 31.....	25
Total.....	\$3 97

Received payment,

T. W. SAUNDERS,

Financial Secretary.

Geo."

It appears from the evidence that this receipt was signed by one George Snyder, who for two or three years had been employed as an assistant or clerk of the financial secretary, Saunders. It was the practice of the financial secretary to permit Snyder to receive and sign receipts for money paid into his office. Saunders, the financial secretary, testified that Snyder only "signed for" money paid into the general fund, and not for money paid in by members at large. But it appears from uncontradicted evidence that Haggerty, who was a member at large, had paid all his dues and assessments to Snyder from December 31, 1893, until July 27, 1896, and that Snyder had receipted for the same. Snyder occupied the position until some time after December 12, 1896, when he became a defaulter, as would appear from the evidence, and the money, payment of which is evidenced by the foregoing receipt, was never turned over by him to the appellant order.

The constitution and by-laws of the appellant order were introduced in evidence.

Sections 7, 8, 9 and 10 of the by-laws are as follows :

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"SEC. 7. In case a beneficiary member has not to his credit in the endowment account of his court the full amount of one assessment in the risk class to which he belongs, for the amount of endowment held by him on the first day of each and every month, he shall stand suspended by his own action, and he shall not be entitled to any benefits from the court or the order during the time of such suspension, nor until he has been duly and legally reinstated. But if the subordinate court is indebted to such member, and such member fails to pay his assessment, he shall not stand suspended until the court has paid out for such member's endowment assessments, special endowment assessments, dues or fines, the whole of such indebtedness. No court shall carry members in arrears for endowment assessments on its books, or advance such arrearages out of the funds of the court.

"SEC. 8. A member suspended for non-payment of endowment assessments, or any accrued liability, such as dues, fines, or any legal extra tax or levy, imposed by his court, may be reinstated at any time within thirty days from date of suspension, by paying all high court assessments and other accrued liability that he would have paid had he remained continuously in good standing.

"SEC. 9. Any member suspended for non-payment of endowment assessment or any accrued liability, as provided in section-7 herein, and not having been reinstated within thirty days from the date of suspension, shall be dropped from membership in this order.

"SEC. 10. Any member who has been thus dropped from membership in the order may be reinstated at any regular meeting within a period of three months from the date of being dropped; *provided*, he shall pay all sums due from him at the date of his being dropped, and furnish a certificate of good health from the subordinate medical examiner, at his own expense, declaring him to be in sound health, and a majority of the members present at the meeting consent thereto. And *provided, further*, that the rights and privileges of such person and his beneficiary shall date from his reinstatement."

The cause was tried with a jury. The court instructed the jury to find for the plaintiff. Thereupon the jury rendered their verdict, assessing the plaintiff's damages at \$1,093. A motion for a new trial was overruled by the court and judgment entered upon the verdict, and this appeal is prosecuted from that judgment.

JOHN C. HENDRICKS and EDWIN A. OLSON, attorneys for appellant.

STEDMAN & SOELKE, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But one question of controlling importance is presented, viz.: Did the payment of all assessments due upon December 12, 1896, as evidenced by the receipt of that date, operate to leave Robert Haggerty a member of the appellant order in good standing at the time of his death, on December 14, 1896?

We are of opinion that it did so operate, and that so far as appears from this record, the payment was regular and effective.

It is contended by counsel for appellant that Haggerty having been, by force of his default in payment of assessment 212, suspended in October, 1896, he could not, under the laws of the order, become again a member in good standing until he had been received back into the order under the provisions of section 10. We do not so understand the provisions. Section 7 provides for suspension upon failure of payment by a member, and makes other provisions governing the relation of the member to his subordinate lodge. Haggerty was not a member of any subordinate lodge, but was a member at large. If, however, he was still subject to suspension under the provisions of section 7, yet this did not operate to drop him from membership. The provisions of section 7 are self-executing to effect a suspension. The provisions of section 9, which provide for dropping a member from the order, are not self-executing, but require affirmative action by the order.

Haggerty's suspension, if he was suspended by non-payment of assessment No. 212, could be waived and he could become again a member in good standing merely by the payment of his delinquent dues and assessments and the acceptance of them by the order, and without any other

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action on the part of the order except the accepting of the payment.

If Haggerty had been actually dropped from membership by affirmative action of the order, which he was not, then the contention of counsel that a reinstatement could not be effected merely by payment of delinquent dues and assessments would be tenable. But Haggerty had never, so far as the evidence discloses, ceased to be a member of the order, and he was, at most, merely under suspension for delinquency, and subject to a forfeiture of his membership, which forfeiture was never effected. *N. W. T. M. Ass'n v. Schauss*, 148 Ill. 304; *High Court I. O. F. v. Edelstein*, 70 Ill. App. 95.

That the payment of the delinquent dues was not made until after thirty days had expired from the date of the suspension, is not, as we view it, sufficient to prevent the payment and its acceptance from operating to waive the suspension. Evidently it was so regarded by the order, for the bill which was paid was formally made out to Haggerty as debtor on December 12, 1896, after more than thirty days had elapsed since the suspension. *Elmer v. M. B. L. Ass'n*, 19 N. Y. Supp. 289; *Bankers & M. Ass'n v. Stapp*, 77 Tex. 517; *Moore v. Order of R. C.*, 90 Ia. 721.

So far as the regularity of the payment evidenced by the receipt is concerned, it is enough to say that the receipt, in the absence of any other showing, is not only sufficient evidence of payment, but it is evidence of a very high character. *Winchester v. Grosvenor*, 44 Ill. 425; *Neal v. Handley*, 116 Ill. 418.

That George Snyder, who, as clerk or assistant of the financial secretary, executed the receipt for him, afterward became a defaulter, is of no importance. So far as the record discloses, he was acting in his capacity as clerk or assistant of the financial secretary when this payment was made. His authority to receive this payment and to receipt for the same may be concluded from the fact that he had been permitted to receive and receipt for like payments by Haggerty for several years preceding.

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The evidence shows a right of recovery. No defense was established. The court properly directed a verdict for the plaintiff, appellee.

The judgment is affirmed.

**Chicago Consolidated Bottling Co. v. John McGinnis, by
his Next Friend.**

1. **MASTER AND SERVANT—*Master's Liability for Negligent Acts of the Servant.***—The master is not to be held to respond for the negligent acts of the servant, done outside the scope of the master's business and the servant's employment, and while the servant is pursuing his own affairs exclusively, even though facilities afforded to the servant by his relation to the master were used in committing the injury, if such facilities were not used with authority or consent of the master.

2. **SAME—*When the Servant Deviates from His Line of Employment.***—If the negligent act be done by the servant while engaged directly or indirectly in the master's business, responsibility of the master can not be avoided on the ground alone that the servant had chosen a method or a route less direct than he might have selected for the work. If the servant, in driving his master's team on his master's business, chooses an indirect route, or deviates from his direct route for purposes of his own, and is yet engaged in performing the master's work in such indirect manner, the master may still be held liable.

3. **NEGLIGENCE—*When the Master is Not Liable.***—In order to make the negligence the act of the servant alone there must be a turning away from the master's service and an entering upon an affair which is the affair of the servant only.

Action for Personal Injuries.—Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 5, 1899.

JAMES MAHER, attorney for appellant.

A. B. CHILCOAT and W. P. BLACK, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

Appellee, a minor, brought suit by his next friend to

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96	*149
86	88
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recover for personal injuries alleged to have been sustained through negligence of appellant.

Upon a former trial appellee recovered, and upon appeal the judgment was reversed by this court. 51 Ill. App. 325.

Appellee has again recovered, and appellant again brings the record here for review.

The evidence is sufficient to establish that an employe of appellant, in driving a wagon owned by appellant, ran over appellee, who was then a boy of about seven years, and injured him; that the employe of appellant, the driver of the wagon, while engaged in delivering appellant's goods, drove a few blocks out of his regular route in order to call upon his wife; that after leaving the house where he had stopped to see his wife he was again proceeding on his employer's business when the injury to appellee occurred; that appellee climbed upon a step of the wagon while the wagon was standing in front of the house where the driver stopped to call upon his wife; that when the driver came out of the house and got upon the wagon to again start upon his employer's business, the boy, appellee, was upon the step and directly in front of the driver as he walked up to the wagon; that the driver must have seen the boy when he, the driver, got upon the wagon and started his team; and that after the wagon was started the boy, appellee, fell from the step and was injured.

It appears that the place to which the driver went to call upon his wife was within the territory which he describes as his "route," that is to say, within the territory in which he delivered the goods of appellant. After leaving the place where he had stopped, which was near the corner of Wood and Ohio streets, the driver was proceeding directly to deliver goods of appellant at a place a few blocks distant and upon the same street, viz., Wood street, corner of Kinzie street, when the injury occurred.

There was some conflict in the evidence, but there was sufficient evidence to warrant a jury in finding the facts to be as above stated. No question is raised as to matters of procedure. The only contention of counsel for appellant

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is, that there could be no recovery upon the facts as above set forth. It is contended, first, that when a servant, acting as driver of his master's wagon, leaves the direct route of his business and goes upon some errand of his own, the master can not be held to respond for negligence of the servant while upon such errand; and second, that the law does not obligate the driver of a vehicle, who has stopped on his way upon the public street, to exercise any reasonable care to learn if children have got upon such vehicle in such manner as to be in danger of injury if the vehicle is moved.

So far as the first question is concerned, it may be taken as well settled that the master is not to be held to respond for the negligent acts of the servant, done outside of the scope of the master's business and the servant's employment, and while the servant is pursuing his own affairs exclusively, even though facilities afforded to the servant by his relation to the master were used in committing the injury, if such facilities were not used with authority or consent of the master. The act for which the master is to be held must be something incident to the employment for which the servant is hired. *Shearman & Redfield on Neg.*, Sec. 147; *Wharton on Neg.* (2d Ed.), Sec. 168; *Story v. Ashton*, L. R. 4 Q. B. 476; *Rahn v. Singer Mfg. Co.*, 26 Fed. Rep. 912; *Cavanagh v. Dinsmore*, 12 Hun, 465; *Sheridan v. Charlick*, 4 Daly, 338.

And on the other hand, it is equally well settled that if the negligent act be done by the servant while engaged directly or indirectly in the master's business, responsibility of the master can not be avoided on the ground alone that the servant had chosen a method or a route less direct than he might have selected for the work. If the servant, in driving his master's team on his master's business, chooses an indirect route, or deviates from his direct route for purposes of his own, and is yet engaged in performing the master's work in such indirect manner, the master may still be held liable. In order to make it the servant's act alone there must be a turning away from the master's service and an entering upon an affair which is the affair of the servant

only. *Shearman & Redfield on Neg.*, Sec. 147; *Mitchell v. Cressweller*, 13 Com. Bench, 237; *Story v. Ashton*, L. R. 4 Q. B. 476; *Joel v. Morrison*, 6 Carr. & P. 546; *P. & R. R. Co. v. Derby*, 14 How. (U. S.) 483; *Geraty v. Nat. Ice Co.*, 44 N. Y. Supp. 659.

Some of the English cases go so far as to hold that the entrusting of the control of the carriage fixes liability of the master, even when used without authority outside of the scope of the employment. *Sleuth v. Wilson*, 9 Carr. & P. 355.

And this doctrine is approved by the Supreme Court of the United States in *P. & R. R. Co. v. Derby*, 14 How. P. 483.

As well stated by Mr. Justice Gary in disposing of the former appeal, "The rule is familiar. The difficulty is in the application." We are of opinion that applying the rule to the facts of this case, it can not be held that the driver of appellant, when he again started on his business of delivering goods of appellant, after having stopped upon an errand of his own, was not engaged in the master's work within the scope of his employment. The special finding of the jury does not find that when he again proceeded upon his work of delivery, he was not engaged in his employer's work, and hence it is not inconsistent with the general verdict.

Upon the second point, as to the duty to ascertain if children were upon the wagon before starting, if the verdict here depended only upon a lack of care in thus examining and inspecting before starting the wagon, a very different question would be presented. But there is more in the evidence to sustain the verdict. The evidence is such that the jury were warranted in finding that the appellant's driver saw the boy and knew that he was upon the step when he started. If it should be conceded that there is no duty to inspect to discover children in danger, yet if it be known that one is in a position to be injured by starting the wagon, it might be held to be negligence to start under such circumstances. The cases cited by counsel bear only upon the duty of inspecting and examining. In one of them the rule

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here invoked is thus qualified: "We hold there was no such duty unless he knew or had reason to believe that the boy was in a position where he would be placed in peril by the movement of the car." *C. & A. R. R. Co. v. McLaughlin*, 47 Ill. 265.

The jury might properly have found from the evidence that the driver was guilty of negligence in starting the team when he knew that appellee was upon the step of the wagon. Nor does this of necessity involve a finding that the driver was guilty of inflicting the injury intentionally and wantonly.

We are of opinion that there is enough in the evidence to sustain the verdict, and we can not say that it is manifestly against the weight of the evidence.

The judgment is affirmed.

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95	880

Frank Wood and Charles C. Arnold v. Hans A. Calland.

1. **FRAUDULENT CONTRACT**—*Must be Disaffirmed upon Discovery.*—A party who claims to have been defrauded must disaffirm the contract at the earliest practicable moment after having discovered the fraud.

Bill to Correct a Deed.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 27, 1899.

Statement.—In August, 1892, appellee purchased a farm in Arkansas from one Major. The premises were subject to a mortgage and were conveyed by a warranty deed which contained the following assumption clause: "This conveyance is given subject to a mortgage of \$4,000 and interest, * * * which the second party expressly assumes and agrees to pay."

Appellant Wood is the holder and owner of the mortgage claim. He has foreclosed his mortgage in the courts of Arkansas. The sale upon foreclosure realized less than

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enough to satisfy the mortgage debt. To recover the amount of the deficiency Wood brought suit at law upon the assumption undertaking against appellee in Cook county, Illinois. Appellant Arnold was his attorney in such suit. Before the suit had proceeded to final judgment appellee filed his bill in chancery, alleging that the assumption clause had been fraudulently inserted in the deed, asking that appellants be enjoined from prosecuting the suit at law, and that the deed from Major to appellee be reformed by striking out the assumption clause.

The amended answer of appellant Wood denies the allegations of fraud and sets up *laches* of appellee as barring relief.

Upon bill, answer and replication thereto, a hearing was had and a decree was entered which is, in substance, as follows: Finds that in August, 1892, appellee made an agreement with Major to purchase property described in bill subject to mortgage of \$4,000; that this agreement was performed by appellee in full; that Major and wife executed and delivered to appellee a deed conveying the Arkansas property; that the same was sent to the recorder of Lawrence county, Arkansas, who refused to accept the same on account of an informality in the execution thereof; that appellee prepared a new deed, similar in form to the other, but correcting the mistake pointed out by the recorder, and sent the same to Major, where he resided in Kansas, to have the same executed; that Major, or his agent, interlined in said deed the words, "which the second party expressly assumes and agrees to pay," referring to the mortgage for \$4,000 on said property, and thereafter executed and acknowledged the deed and returned it to the office of appellee in Chicago; that said deed was received in appellee's office during his absence from the State of Illinois; that said absence was known to Major; that deed was sent to Lawrence county, Arkansas, for record, by the son of appellee, then a minor; that appellee did not know of the interlineation until after the deed was recorded; and never assented to said interlineation in any way, and never agreed

to assume or pay said mortgage; that the said interlineation was a fraud upon appellee, and that appellee is entitled to have the deed reformed and the said clause stricken from said deed.

The court further finds that appellant Wood purchased the note and mortgage for \$4,000 on the Arkansas property, and caused the same to be foreclosed, and bid in the property for a portion of his claim, viz., \$2,500, which left a deficit, after crediting the same, of \$2,758.20; and that appellee was not a party to said suit; that a deed was obtained under the foreclosure sale, running to Wood.

The court further finds that in May, 1895, Wood began a suit on the law side of this court, against appellee, for the said balance of \$2,758.20, and that said suit is still pending and undetermined.

It is thereupon ordered, adjudged and decreed that the prayer of the bill in said cause be granted; that the deed from Major and wife to Calland, dated August 25, 1892, and conveying the Lawrence county, Arkansas, property, be reformed by striking out the words, "which the second party expressly assumes and agrees to pay," and Wood and Arnold be perpetually enjoined from prosecuting the said suit against Calland, and from prosecuting or attempting to prosecute any claim or suit against Calland on account of any deficiency arising under the decree entered in the foreclosure suit begun by said Wood to foreclose said mortgage.

There was evidence tending to sustain all the material findings of the decree. There was also evidence to sustain the defense relied upon in the amended answer of appellant Wood, viz., that appellee had been guilty of such *laches* as should bar relief. The evidence in that regard is, in substance, as follows: The deed containing the assumption clause in question was executed by Major in September, 1892, and was received at the office of appellee early in October, 1892, and at once returned to the recorder of Lawrence county, Arkansas, for the purpose of having it recorded. It reached the office of appellee during his

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absence from Chicago, and was returned by his son without knowledge of appellee. Appellee testified upon the trial that he first heard that the deed contained the assumption clause in April, 1895. His testimony to this effect was in the following terms: "So far as I remember, I did not see it until I got it in April, 1895." In his testimony, given in connection with the suit at law, however, appellee testified directly that he knew of the assumption clause in the latter part of December, 1892. His testimony was as follows:

"Q. When did you first see that deed after you sent it to Major as you have stated? A. In the latter part of December, 1892.

"Q. When did you first observe the interlineation you have spoken of after the words 1892, and thereafter, which you say is not in your handwriting? A. A few days after the deed was received, a deed was made out to Thomas Scott, * * * to whom I sold my equity, * * * and I then noticed the interlining in this deed."

It appears from the evidence that on February 23, 1893, appellee sold and conveyed the land in question to a Mrs. Jenkins, who immediately deeded the property to one Scott. On September 20, 1893, after he had conveyed his equity to Mrs. Jenkins, appellee wrote the following letter to an agent of appellant Wood:

"I received to-day a letter from Thos. J. Scott in Porter, Arkansas, and I send you a copy so far as it concerns the Loan Company. 'In the matter of the Deed Trust Loan Company debt will say that I am trying to get Loan Company to give me extension to January 1, 1894, so I can meet debt without any additional costs. Don't know whether they will grant my request or not. But if they do not I will (if they sell) redeem premises. I know I have ninety acres in watermelons, five acres in cantelopes, 105 acres in corn, so with average crop and fair prices can pay farm out without any inconvenience to myself; besides I will dispose of other that I have to help me out in the event of my crop not turning out well.' Scott has such a crop as he says and if you take possession of farm now, you will have no trouble of getting all interest paid up at once. Such a crop as he is speaking about must be worth \$2,000 to \$3,000. There is no excuse for Scott not paying up interest at once. I am the one that got it in the neck.

"In confidence—I have it from a party in Walnut Ridge that Thos. J. Scott may try to get all he can out of farm this summer and then let you foreclose. Better get your interest in full—he will pay that if you take possession."

The decree contains no findings of the court as to when appellee first learned of the assumption clause in his deed. From the decree this appeal is prosecuted.

CHARLES C. ARNOLD, attorney for appellants.

N. M. JONES, attorney for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

We are of opinion that the findings of the decree are supported by the evidence, in so far as they find that the assumption clause was inserted in the deed without knowledge of appellee, and that when the deed was sent by appellee's son to the recorder, appellee was not aware that the clause had been interlined.

The only question presented is whether, notwithstanding the facts established by this evidence, the appellee is barred from any relief by his own *laches*. The decree contains no finding as to when appellee first learned of the assumption clause in the deed. We regard the evidence as such as would warrant the chancellor in finding that there had been such *laches* as would defeat any relief. The evidence would have very amply sustained a finding by the chancellor that appellee learned of the assumption clause in the deed by which he held title to the property, as early as in December, 1892.

Appellee states in his testimony upon the trial that he first knew of the clause in the deed in 1895, but his testimony is not positive in form, and it is directly contradicted by his positive testimony given in the suit at law and introduced upon this trial by consent, to the effect that he did know of the clause in December, 1892, when he copied it in making the deed to Mrs. Jenkins. It is scarcely possible that he could have copied the deed without noticing this

clause. His letters tend to show that he knew of the clause and was aware of his liability therefrom arising. Yet he did nothing whatever to disaffirm his assumption of liability, according to the terms of the clause, until January 15, 1897, when the bill of complaint was filed in this cause—unless it may be said that he expressed such disavowal by his defense to the suit at law interposed in 1895. What the defense was as interposed by appellee in the suit at law can not be determined from the evidence as abstracted. But if it appeared that in 1895, by his defense in the suit at law, appellee had in effect disavowed the acceptance by him of the deed containing the clause, yet there would have intervened the period between December, 1892, and May, 1895, during which appellee, with knowledge, remained silent and permitted appellant Wood, as the owner of the mortgage claim, to rely upon this undertaking of appellee, as expressed in the assumption clause. A serious question as to *laches* of appellee which would bar relief would be presented by this state of facts. If, on the other hand, the court found that there was knowledge in December, 1892, and no disavowal of liability until the filing of the bill of complaint in 1897, the conclusion as to such *laches* would be almost unavoidable. *Cox v. Montgomery*, 36 Ill. 396; *Hall v. Fullerton*, 69 Ill. 448; *Perry v. Pearson*, 135 Ill. 218; *Greenwood v. Fenn*, 136 Ill. 146; *Day v. The F. S. Investment Co.*, 153 Ill. 293; *Sutter v. Rose*, 169 Ill. 70; *Morey v. Pierce*, 14 Ill. App. 91.

The rule announced by these decisions is that a party who claims to have been defrauded must disaffirm the contract at the earliest practicable moment after having discovered the fraud. In *Sutter v. Rose*, *supra*, this rule is applied to facts very similar to the facts of the case under consideration.

The defense of *laches* of appellee was set up by the amended answer of appellant. There was evidence strongly tending to show such *laches*. The decree fails to find when appellee first had knowledge of the assumption clause. The evidence fails to disclose, and the decree does not find,

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whether there was disaffirmance of the contract in 1895, or for the first time in 1897.

We are of opinion that upon this state of the record the decree must be reversed and the cause remanded.

Gomer E. Highley v. The American Exchange Nat'l Bank.

1. MASTER IN CHANCERY—*Findings Conclusive*.—A master in chancery, seeing the witnesses, has better opportunities of determining the credibility of a witness than the Appellate Court. He can pass upon his manner of testifying, conduct upon the witness stand, apparent truthfulness, etc., which are matters incapable of review in this court.

2. WITNESS—*Effect of Testimony, Inherently Improbable*.—The testimony of an interested witness to facts inherently improbable, need not be accepted by court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness is not otherwise impeached.

Bill for Relief.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899.

Statement.—The bill of complaint filed by appellee in this case seeks to compel the application of 308 shares of stock in the Mutual Fuel Gas Company upon a judgment in favor of appellee for \$18,892.52, against Charles D. Hauk. Appellee seeks to reach this result in either one of two ways:

First. The bill alleges that said shares were bought by appellee at sheriff's sale for \$1,500, under an execution issued upon said judgment, and asks the court to compel a transfer of the shares to appellee.

Second. The bill is as well, in effect, a general creditor's bill upon said judgment, and charges that defendants, or some of them, have property belonging to the judgment debtor which should be applied upon said judgment.

Hauk, the judgment debtor, who was co-defendant with appellant, Highley, the Illinois Trust & Savings Bank, and

86	48
86	60
86	69
186	565
86	48
92	1828
86	48
99	54

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others, was defaulted. Upon answer of appellant and replication, the cause was referred to a master in chancery to take proof and report the same, with conclusions. It appears from the master's report of evidence heard before him, that appellee recovered its judgment against Hauk on March 21, 1895, upon a promissory note made by Hauk, and dated May 6, 1893. That execution thereon issued March 21, 1895, and that upon the same day the sheriff undertook to levy upon all the shares and interest of Hauk as a stockholder in the Mutual Fuel Gas Company, by delivering an attested copy of the writ to the secretary of the corporation and demanding of him a certificate of the number of shares and amount of the interest of Hauk in the company. It appears that the secretary thereupon delivered to the sheriff a certificate, stating that sixty shares of the stock of the corporation stood in the name of Hauk upon the books of the corporation. The sheriff levied upon these sixty shares, and also upon all other shares and interest of said Hauk as a stockholder in the corporation. By virtue of the writ and levy the sheriff afterward sold at sheriff's sale the sixty shares of stock and "all other shares and interest" of said Hauk for \$1,500, to appellee, applied the amount, less expenses of sale, upon the execution, and returned the execution unsatisfied as to the balance thereof. Notice of sale and demand for certificates of the sixty shares of stock were then served on the secretary of the corporation. It appears, also, that aside from the sixty shares of stock standing in the name of Hauk, there were 248 other shares of the capital stock of the corporation which were owned by Hauk and by him transferred to the Illinois Trust and Savings Bank, as collateral to secure an indebtedness of Hauk to the bank. That after the transfer by Hauk to this bank, the 248 shares had been changed into the form of trustee's certificates for the same amount of stock, under a certain trust agreement entered into by Hauk and other stockholders with Mitchell, Hamill and Willing as trustees. That the Illinois Trust & Savings Bank held the original 248 shares as collateral until Febru-

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ary 6, 1894, and thereafter held the trustees' certificates for the same amount of stock, and for the same purpose, viz., as collateral.

The sixty shares of stock which remained in the name of Hauk upon the books of the company were so-called "additional stock," issued by resolution of the corporation of July 25, 1894, and sold to stockholders in amounts proportioned to their holdings of stock. It was by virtue of his ownership of the 248 shares that Hauk became entitled to purchase and did purchase the sixty shares. The certificate of the sixty shares also was given as additional collateral security to the Illinois Trust & Savings Bank by Hauk. The bank afterward sold all the 308 shares of said stock, and realized therefrom \$55,440, which left, after paying the claims of the bank, the sum of \$20,358.82, now in the hands of the bank. The controversy here is as to the right of appellee to that fund as the purchaser at sheriff's sale, or as the judgment creditor of Hauk. The Illinois Trust & Savings Bank make no claim to this fund, but hold it to abide the result of this suit. Hauk makes no claim to the fund, but is defaulted. Appellant, Highley, alone contests the right of appellee to the fund. He claims to have purchased the 248 shares of stock subject to the claim of the Illinois Trust & Savings Bank, in February, 1894, for \$2,000, and to have thereafter, in September 1894, purchased the other sixty shares, subject to the same claim of the Illinois Trust & Savings Bank for \$500, which sums of money he claims to have paid to Hauk. It appears also that Hauk was, and still is, indebted to appellant, Highley, in the sum of about \$9,800. Highley does not, however, claim as a lienor, or otherwise, by reason of this debt, but as a *bona fide* purchaser for value, viz., for the \$2,000 and the \$500 alleged to have been paid by him to Hauk.

The sole controversy of fact presented is, did Highley purchase this stock as claimed by him? The master in chancery found that he did not, and recommended a decree for appellee. The chancellor overruled exceptions to the

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master's report and decreed in conformity with the findings and recommendations of the master.

The decree, in effect, found that the 308 shares of stock in question were not the property of appellant, Highley, as claimed by him, that he had no interest in such shares, and that they were the property of the defendant, Hauk, subject to the claim of the Illinois Trust & Savings Bank, and the decree ordered that the Illinois Trust & Savings Bank, one of the defendants, pay to appellee the amount of \$20,353.82 held by it, and that appellant, Highley, pay costs.

From that decree this appeal is prosecuted.

GEO. S. STEERE, attorney for appellant; H. W. WAKELEE, of counsel.

SWIFT, CAMPBELL & JONES, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

No one prosecutes the appeal here except Highley, and he bases his claim entirely upon the ground that the evidence establishes that he was a purchaser for value in February and September, 1894, before any right of appellee accrued, and hence that the decree is against the weight of the evidence.

Other questions are raised, as to the validity of the sheriff's levy and sale; as to the sufficiency of proof of the date of the origin of the claim of appellee upon which it obtained its judgment; and as to other property of the judgment debtor, Hauk, held by appellee. But the question of fact first noted is determinative of the case. There is no sufficient evidence in the record that appellee held other property of the judgment debtor when this bill was filed. The master's report declares that a certified copy of the note upon which judgment was obtained by appellee was introduced in evidence before him, and he reports in his findings that the note was dated May 6, 1893, before either of the alleged sales to appellant are claimed to have been

made. The validity of the sheriff's levy and sale, while presenting an interesting question, is not a matter necessary to be determined in this case, for if the decree is right in finding that appellant, Highley, did not purchase the stock and had no interest therein, then it is a matter of no consequence whether the sheriff's sale gave title or not. For in that event the decree would be warranted by the allegations of the bill and the evidence, as a decree subjecting this fund to the payment of the judgment debt. We proceed, therefore, to consider the sufficiency of the evidence to sustain the findings of the decree as to Highley's claim to the stock as a purchaser for value.

As before indicated, it is not contended by Highley that the alleged indebtedness of Hauk to him, to the amount of \$9,800, was in any way the basis of the transfer of the stock claimed to have been made by Hauk to Highley. No other consideration for the transfer is relied upon save the alleged money payments of \$2,000 in February, 1894, and \$500 in September, 1894. Hauk was not called as a witness. Highley testified that Hauk was his brother-in-law, and resided with him when in Chicago; that no part of the indebtedness of Hauk to him (the \$9,800) had been paid by transfer of the shares of stock; that the shares were not transferred to him in payment or security for any indebtedness, and that he purchased Hauk's equity in the 248 shares (subject to claim of Illinois Trust & Savings Bank), in February, 1894, for \$2,000. His account of the transaction is as follows:

"I purchased Mr. Hauk's equity in 248 shares of that stock in February, 1894. Hauk owned 248 shares of the gas company's stock, which he hypothecated to the Illinois Trust & Savings Bank for a loan. He wanted some money and offered to sell me that stock subject to the indebtedness of the Illinois Trust & Savings Bank. I bought the stock of him, and paid him \$2,000. I probably gave him a check for it; that is my recollection; it was my own check; was paid in the usual course of business by my bank, and returned to me in the usual course of business. I do not know what has become of it. I do not keep old checks or old papers; I usually destroy them after a year. To the

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best of my knowledge and belief I have destroyed that check. I haven't the check book from which this check was drawn; I don't keep them; all matters are usually thrown away after the first year. To the best of my knowledge and belief I have destroyed that check book. I do not keep any account books for my private affairs. I have no account or memorandum or document of any kind showing the payment of that \$2,000. The stock in which Hauk sold me his equity was then at the Illinois Trust & Savings Bank. I did not go to the bank before I made the purchase to ascertain whether the shares were there. The time I made the purchase I had no other knowledge on that point, except what I derived from Hauk. The time I purchased Hauk's equity I had an idea that the stock was worth approximately 115; it was not listed, so there was no market value. I knew nothing more about the terms of the pledge of those shares to the Illinois Trust & Savings Bank than what Hauk stated to me; he stated that he had borrowed something over \$30,000 on the stock. My inducement for then purchasing the stock was that the man wanted to sell it, and I thought it was a good investment; that the stock was probably as low as it would be, and I thought in the future it would be worth more money. I have never received any document from Hauk showing the sale of his equity to me in those 248 shares, and I never paid him anything more for his 248 shares than that \$2,000. Hauk was living with me at that time. This purchase of his equity in the 248 shares took place probably at my house; I don't remember distinctly now about the time and place. The matter first came up as a proposition from him to sell his equity in the stock to me. A day or so after, I offered him \$2,000 for it; he asked a little more at the time he made the proposition. In the interim I made no inquiry of anybody about the value of the stock, but I knew of its value in a general way. I knew about the company, knew what its business consisted of, what kind of a plant they had, and about what business they were doing. I did not then know Hauk's financial condition; everything now looks as if he was insolvent at that time. I had not made any effort to collect the demand notes which I held against him (the \$9,800). I knew he couldn't pay it at that time. I wrote to the bank to verify the truth of Hauk's statement that 248 shares of stock were deposited with the bank about a week or ten days after the purchase. I have no means of fixing the day of the month when this payment was made. I have not the statements of account returned

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to me by the bank when they returned my checks. I went to the bank in the month of February with Mr. Hauk. I saw the president, Mr. Mitchell; I did not see the 248 shares of stock; did not attempt to see them. To get them transferred to my name on the books I asked Mr. Mitchell at my interview when I went there with Hauk to have the stock transferred; I did not request that it should be done at that time. Hauk and I went into the bank and met Mr. Mitchell, and Hauk told Mitchell that he had sold his equity in the stock to me. I did not at that time see the shares and did not talk about the number of shares with Mr. Mitchell. I took Hauk's statement as to the number of the shares. I don't remember that I asked to have the stock transferred at that interview with Mr. Mitchell when Mr. Hauk was with me in 1894; my statement to Mitchell at that time was that having purchased the equity in the stock I asked Mitchell if it was necessary to have the stock transferred now, and he said he would do it at any time we wanted it done, and I left the matter in that way. In pursuance of the talk had at that time the stock was transferred to my name early in 1895. I talked with Mitchell about the stock a great many times during the year. Was present at the bank when the stock was transferred to my name early in 1895. New certificates for 308 shares were issued in my name. I first saw the certificates in office of Henkle, secretary of the bank, when this transfer was made. I guess it was in March, 1895, probably about 10 A. M. Hauk was not with me.

"I paid \$500 or \$503 for the sixty shares in September, 1894. I paid for them by check directly to Hauk. The transaction was made at the Illinois Trust & Savings Bank. My recollection is I drew the money and gave Hauk the currency. I never have taken anything from Hauk to show my purchase. I gave notice to Mitchell, president of the Illinois Trust & Savings Bank, that I had purchased the equity and that the stock belonged to me, subject to the claim of the bank. It was two or three days after I purchased it. The notice to Mitchell was verbal. The sixty shares and the 248 shares were transferred to my name on books of the company March 19, 1895. I never saw any of the certificates till March 19, 1895. When I bought these sixty shares Hauk stated that his indebtedness to the bank had been increased \$5,000, and was about \$35,000. I never ascertained, except from Hauk's statement, the exact amount of his indebtedness to the bank when I bought the 248 shares. From February, 1894, I

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have been making whatever payments have been made to the bank on Hauk's indebtedness. Have usually gone to the bank to pay this interest. The bank credited dividends on interest, and I paid balance of interest. I don't remember what the stock was worth at the time I bought the sixty shares for \$500; the stock not having any value, I can't say I did know what it was worth, only approximately; my idea of the value of sixty shares was that they were not worth a great deal more than the other; I may at that time have had an idea that it was worth more than 115; I don't remember what my figures were at that time; I had an idea it was worth more than par at any rate. I do not know what this stock was worth in September, 1894, at the time I bought this sixty shares; from February, 1894, to September, 1894, I think the stock was paying from one and one-quarter to one and one-half dividends."

We have referred to the testimony of Highley thus at length because the case turns so largely upon his credibility as a witness and the weight to be given to this evidence.

The evidence which may be said to conflict with the testimony of Highley consists, for the most part, of the actions and conduct of the parties, Hauk and Highley, after the date of the alleged sale, and the testimony of R. M. Orr, cashier of appellee. Orr testified positively that on March 19, 1895, he had conversations with Hauk and Highley in relation to the application of the equity of Hauk in these shares of stock upon the claim of appellee against Hauk, and that Highley then represented that he held the stock only as security for his claim of \$9,800 against Hauk, and made no pretense to any claim as a purchaser. Highley denied that he had such conversation with Orr.

Upon this evidence the master in chancery and the chancellor concluded that Highley did not purchase the stock for value, as he asserted. The master in chancery had better opportunity for measuring the credit due to Highley's testimony than we have, for he saw the witness and could pass upon his manner of testifying, conduct upon the witness stand, apparent truthfulness, etc., which are matters incapable of review. We should, therefore, be loath to disturb the conclusions of fact reached by the master in chancery and approved by the chancellor, unless we could say that such

conclusions were manifestly against the weight of the evidence. After a careful examination of all the evidence, we are not able to hold that the master and the chancellor erred in this behalf. As to the weight to be accorded to a concurrence in conclusions of fact by master in chancery and chancellor, see *Siegel v. Andrews*, 181 Ill. 350.

There is much of inherent improbability in the testimony of Highley. The 248 shares of stock which Highley declares that he bought for \$2,000, subject to the bank's claim, were then worth, at his own estimate, less than \$30,000, and the bank's claim, upon which they were held as collateral, was more than \$30,000, and Highley knew this. Therefore, if his statements be true, he gave \$2,000 for that which was then worthless. When he claims to have paid \$500 for sixty shares, also subject to the bank claim, the total of the value of the 308 shares at 115 was \$35,420, and the bank's claim was then \$35,000. In other words, he then gave \$500 for what was worth at most \$420, after having lost \$2,000 in like manner by the purchase of the February proceeding. When it is considered that Highley was, as he claims, then a creditor of Hawk to the extent of \$9,800, which he knew Hawk was unable to pay, the theory that he made these investments without inquiry and without any written evidence of the transaction is not credible. The testimony as to checks by which payment is said to have been made might not alone be sufficient ground for discrediting his testimony, but considered with all else in the testimony it certainly does not strengthen that testimony. After the time of the alleged sale of the 248 shares to Highley, it appears that Hawk exercised his right as owner of these shares to purchase his proportionate share of the additional stock, voted in July, 1895, of which the sixty shares here involved were a part. The time of the ostensible transfer of the stock from Hawk to Highley was very near to the time when appellee was seeking to obtain that stock for the payment of its claim, both being upon March 19, 1895.

. The testimony of an interested witness to facts inher-

Chicago & E. I. R. R. Co. v. Kirby.

ently improbable need not be accepted by court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness is not otherwise impeached. *Elwood v. Western U. T. Co.*, 45 N. Y. 549; *Kavenagh v. Wilson*, 70 N. Y. 177; *Koehler v. Adler*, 78 N. Y. 287; *Quock Ting v. United States*, 140 U. S. 417.

We think that the evidence warranted the court in finding that the conveyance of the shares of stock to Highley was merely colorable, and that he held them as a secret trust in favor of Hauk, the vendor, who was the debtor of appellee at the time of the alleged conveyance.

We are of opinion that the findings of the master in chancery and the decree of the court below were based upon a proper and just measurement of all the evidence in the case. The decree is affirmed.

Chicago & E. I. R. R. Co. v. James Kirby, Jr.

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1. *EVIDENCE—Uncontradicted Testimony to What is Physically Impossible Must Be Rejected.*—The testimony of a witness to that which is physically impossible must be rejected as not in accordance with the truth of the matter, even though uncontradicted by the direct testimony of any other witness.

2. *SAME—Testimony of Interested Witness to Facts Inherently Improbable.*—The testimony of an interested witness to facts inherently improbable need not be accepted by court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness was not otherwise impeached.

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed December 14, 1899.

W. H. LYFORD and S. A. LYNDE, attorneys for appellant.

JOHN R. PHILP and W. S. JOHNSON, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$6,000, rendered in an action on the case for negligence, in favor of appellee, and against appellant. Appellee claims to have been struck and injured by an engine of appellant drawing a freight train southwardly across Twenty-ninth street in the city of Chicago, between six and seven o'clock P. M., July 11, 1896. Twenty-ninth street is an east and west street. There are five tracks running north and south across Twenty-ninth street, which are operated by appellant. The most westerly of these tracks is a switch track which runs into a coal yard a short distance north of Twenty-ninth street. The track next east of the switch track is a freight track, and appellee was injured on the freight track by a train moving south. He claims that the engine of the freight train struck him, although there is a conflict in the evidence on that question. The injury was to his right arm, which, on account of the injury, had to be amputated just above the elbow. There was a fence about seven feet high on the north side of Twenty-ninth street, which ran across the switch track, and came to within a few feet of the freight track. There was a gate in the fence where it crossed the switch track, which one of the witnesses testified was open. The freight track is straight from Twenty-second street to Twenty-ninth street, a distance of seven blocks. It was clear daylight at the time of the alleged injury. Appellee was familiar with the crossing, as he lived only a short distance from it. He testified that he crossed the tracks about every day.

It is averred in the declaration that, at the time of the injury, appellee was exercising all due care and diligence for his safety. Appellee testified that he was on the north side of Twenty-ninth street, when he started across the tracks; that he walked along and kept walking; that when he got between the switch track and the freight track he looked north; that there was lots of smoke on the track from other engines passing, but there was nothing else to obstruct his view; that his eyesight was good and he could

see about a block north, up the track, but did not see any train; that he then immediately stepped on the freight track and was struck. It does not appear from his evidence that he stopped walking at all from the time he started to walk across the track until the accident occurred. William Penrold, witness for appellee, testified that he was about one hundred feet behind appellee when the latter was struck; that before he was struck he stopped about a second and looked north and south. Appellee testified in his direct examination that he was about three feet from the track when he looked north and south. Now, if he stepped on the freight track and was instantly struck by the train, as he says, after immediately looking north for a second, the train must have been so close to him at the time he says he looked north, that, his eyesight being good, as he says, he must have seen it.

One witness for appellee testified that the train was running from fourteen to eighteen miles per hour, but the great preponderance of the evidence is, that its speed did not exceed six miles per hour. But even if it were running at the rate of eighteen miles per hour, it would only run about twenty-six and two-fifths feet in a second, and the evidence is that it is 266 feet from Twenty-eighth street to Twenty-ninth street, one block, the distance which appellee says he could see. Assuming, therefore, his testimony to be true, that he looked north just before stepping on the freight track, that the evening was clear and bright, which fully appears from the evidence, and that appellee's eyesight was good, as he says it was, it is a physical impossibility that he did not see the train. The only alternative to this is, that his testimony is untrue; that he did not look. The testimony of the witness to that which is physically impossible, must be rejected as not in accordance with the truth of the matter, even though uncontradicted by the direct testimony of any other witness. C., R. I. & Pac. Ry. Co. v. Pounds, 82 Fed. R. 217, 219; Southern Ry. Co. v. Smith, 86 Id. 292; Artz v. C., R. I. & P. R. Co., 34 Ia. 153, 159; Penn. R. Co. v. Bell, 122 Penn. St. 56.

VOL. 86.] North Chicago St. R. R. Co. v. Balhatchett.

In the recent case of *Highley v. Am. Ex. Nat. Bank*, in this court, No. 8386, unreported, it is said, "The testimony of an interested witness to facts inherently improbable need not be accepted by court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness was not otherwise impeached," citing authorities. We are of opinion that the evidence is insufficient to warrant a finding that appellee, at the time of the alleged injury, was exercising ordinary care.

This view renders unnecessary any discussion of the evidence bearing on the question of the alleged negligence of appellant.

There are other circumstances in evidence of such character that we think justice will be subserved by the submission of the case to another jury. The judgment will be reversed and the cause remanded.

North Chicago St. R. R. Co. v. Thomas J. Balhatchett.

1. *EVIDENCE—Leading Questions.*—The plaintiff having been injured while a passenger on a street car, the question asked a physician, called as a witness, whether or not he discovered any swelling upon the back of plaintiff's head on the day succeeding that of the injury, was not objectionable as being leading and suggestive.

2. *SAME—Objections Must Be Specifically Made.*—The objection that a question is leading must always be specifically made.

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 19, 1899.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

MUNSON T. CASE and GEORGE WILLARD, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The appellee was a passenger upon one of appellant's street cars, and sued to recover for an alleged injury to his person while being carried as such.

The theory of the defense by appellant, under its plea of the general issue, as disclosed by the evidence, was (1) unavoidable accident, and (2) that appellee sustained no material injury. According to the testimony of appellee, he was sitting when the car was run into, and his head was thrown backward against the partition between the two windows behind him, causing a swelling, about the size of a goose egg, to come upon the back of his head, and such swelling remained for two or three days, when the acute condition of swelling passed away.

This swelling was the only objective symptom of injury received by the appellee, so far as appears from the evidence, and appellee was himself a physician. All else were subjective symptoms. One Dr. Washburne attended appellee and made an examination of his person the day following that of the injury. This doctor was called as a witness by appellant for the purpose of contradicting the testimony of appellee as to the character and extent of his injury.

Next following his statement that he visited and examined appellee the day succeeding that of the injury, the witness was asked the following question :

"State whether or not, Doctor, at that time, you discovered any swelling upon the back of Dr. Balhatchett's head ?"

The question was objected to and ruled out, upon the ground that it was leading and suggestive. Thereupon, this question was put to the witness :

"Was there any swelling at that time upon the back of Dr. Balhatchett's head ?"

A merely general objection was interposed and sustained to the question last put, and the witness testified no further, except in answer to some usual preliminary questions that had preceded those objected to.

The first question was not a leading one. It was no more suggestive of a negative than of an affirmative answer. It

was a mere calling the mind of the witness to the subject of inquiry. *McDonald v. Ill. C. R. R. Co.*, 88 Iowa, 345; *Spear v. Richardson*, 37 N. H. 23.

The objection to the second question upon the ground that it was leading and suggestive, might, perhaps, have been well made, but it was not made or ruled out upon that ground, and the objection that a question is leading must always be specifically made. *First National Bank v. Dunbar*, 118 Ill. 625; *Edmanson v. Andrews*, 35 Ill. App. 223.

The subject inquired concerning was material to the defense, for the question, if answered in the negative, would have tended directly to contradict the appellee upon the only material subject concerning which he had testified, that was susceptible of positive contradiction—that of the objective symptoms of his injuries.

Appellee makes the point that though the ruling may have been incorrect, it should have been made to appear that if the answer had been allowed it would have been favorable to appellee, by an offer to show what was expected to be proved by it. It is perfectly plain from the record what the object of the question was, and what answer was hoped for, though the answer was not suggested, and the reason for the rule contended for by appellee does not, therefore, exist.

For error in ruling out the offered testimony the judgment is reversed and the cause remanded.

Theodore Podolski v. A. L. Stone, Assignee.

1. **PREFERENCES**—*Obtained Through the Acts of the Debtor.*—Any preference obtained by the creditor, by or through the acts of the debtor, after the debtor has determined to yield dominion of his estate by making a general assignment for the benefit of creditors, is within the prohibition of the statute and void.

2. **VOLUNTARY ASSIGNMENTS**—*What Acts Constitute.*—All the acts of the debtor, performed with the intent and for the purpose of effecting

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a disposition of all his property for the benefit of his creditors, are to be regarded as a single transaction, each constituting part of the general assignment of his assets under the statute.

3. *SAME—What Acts of the Debtor Are Within the Statute.*—After a debtor has made up his mind to make an assignment of his property for the benefit of his creditors, all conveyances, transfers and other dispositions of his property or assets, made in view of his intended general assignment, whereby a preference is given, will be held to be within the prohibition of the statute and void, the same as though incorporated in the deed of assignment itself.

4. *WITNESSES—When Interested, and Statements Are Inherently Improbable.*—The testimony of an interested witness to facts inherently improbable, need not be accepted by the court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness is not otherwise impeached.

5. *SAME—How Contradicted.*—A witness may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his accounts of particular transactions, or of his own conduct, as to discredit his whole story.

6. *PRESUMPTIONS—Where the Hearing is Before the Court.*—Where the hearing is before the court, it will be presumed that the court, in reaching its conclusion, rejected all incompetent and only considered competent evidence before it.

Petition for a Preference.—Voluntary assignments. Appeal from the County Court of Cook County; the Hon. R. W. S. WHEATLEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899.

JOHN E. KEHOE and JAMES R. WARD, attorneys for appellant.

A. BINSWANGER and ELMER E. JACKSON, attorneys for the assignee.

MOSES, ROSENTHAL & KENNEDY, attorneys for Fred'k Viotor & Achelis et al., creditors.

PAM, DONNELLY & GLENNON, attorneys for Converse, Stanton & Co. et al.

CUSTER, GODDARD & GRIFFIN, attorneys for the Continental Nat. Bank.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant in this case seeks a preference over the other creditors of S. Levy & Co., who made an assignment of all

their property for the benefit of their creditors to appellee, which assignment was dated May 31, 1898, was acknowledged and recorded the same day in the office of the recorder of deeds in Cook county at 1:39 P. M., and filed with the clerk of the County Court at 1:43 P. M. of the same day.

It appears that S. Levy and I. Birkenfield, partners composing the firm of S. Levy & Co., in January, 1898, and for some time prior thereto, had been engaged in the mercantile business at 240 Market street, Chicago; that on January 27, 1898, appellant loaned to S. Levy & Co. \$3,500, and as evidence of such loan took the note of the firm for that amount, maturing four months after date and bearing interest at six per cent per annum; that on the date of the maturity of the note he called upon Levy & Co. for its payment, but they were unable to pay him, whereupon he asked that a judgment note be given him in its stead, which was done, the note being dated May 28, 1898, for the same amount as the original loan, but bearing interest at the rate of seven per cent per annum, and having a power of attorney thereto annexed, which gave power to confess judgment at any time after the date thereof; that May 29th and 30th, 1898, were Sunday and Decoration Day, respectively, and on May 31st following appellant caused to be entered a judgment by confession in the Circuit Court of Cook County, on which execution was issued immediately, and placed in the hands of the sheriff of Cook county at 10:16 A. M. of that day, with directions by appellant's attorney to the sheriff to levy the writ at once; that the sheriff's deputy proceeded to the place of business of Levy & Co. to make such levy, but when he arrived he found that the door of the store was closed and the property of Levy & Co. in the hands of the appellee, Stone, who was named as assignee in the deed of assignment; that Stone received a letter from S. Levy on the morning of the 31st of May, about half-past eight, requesting him, Stone, to call at 108 Fifth avenue; that he did so and arrived there fifteen or twenty minutes past nine o'clock, but did not find Levy; that he returned in about half an hour, when he found

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Levy and Birkenfield, it then being near ten o'clock; that Levy told him that he was going to make an assignment, and asked him to act as assignee, to which he assented; that he, Stone, received the deed of assignment from Mr. Ward, the attorney of Levy & Co., about ten minutes before eleven o'clock, and went with him to the store of Levy & Co. at once and took possession of their stock in trade.

August 19, 1898, appellant filed his petition in the County Court setting up his judgment and asking that the assignee be directed to pay the same out of the moneys realized from a sale of the insolvent estate. Certain creditors of the insolvents, and also the assignee, answered the petition, claiming that there was no consideration for the note and warrant of attorney on which the judgment was confessed; that the judgment was confessed at the instigation of the insolvents, and in contemplation of making an assignment, and that the judgment was confessed for the purpose of preferring appellant over the other creditors of the insolvents; also that appellant, knowing that said insolvents were about to make an assignment for the benefit of their creditors, did, with a view of obtaining a preference over the other creditors, procure said note and warrant of attorney from them, and that the insolvents, in collusion with appellant, to enable him to secure such preference, made and delivered the note and warrant of attorney, and that the insolvents were then contemplating the making of said assignment, and that appellant, with like intent, caused said judgment to be confessed and the execution delivered to the sheriff.

The principal evidence on behalf of the assignee, and that upon which the judgment of the County Court must mainly depend, is that of appellant, which, it is claimed, is wholly insufficient to sustain the judgment of the County Court, which denied the petition of appellant and dismissed it for want of equity.

The insolvent, S. Levy, refused to testify on the hearing on any matter which would in any wise throw light on his transactions with appellant, upon the ground that his testimony might tend to criminate him.

One of the counsel now representing appellant prepared the deed of assignment, and also represented the assignee at the beginning of the proceedings in the County Court. He also represented appellant on the hearing of his petition in the County Court, and made objection to proper questions asked of the insolvent, Levy, while on the stand as to matters entirely relevant and material under the issues. He made one objection, at least, which could only be properly made by the witness himself, it relating to the possible crimination of the witness by his answer. The action of counsel made it apparent that he did not desire a full investigation.

It is unnecessary to set out in detail the evidence of appellant, and we will only refer to some of its salient points. He testified that at the time he took the judgment note in question, he did not know of the insolvency of Levy & Co., although he said that Levy told him that he was unable to pay the note maturing May 27th, and his bank was pressing him for money, and that Levy said to him on the same day that he was greatly in need of money, that the bank was pressing them, wouldn't renew their notes, and he wanted to sell his book accounts at a discount; that the next day after the judgment note was taken, according to his testimony, though the same day the note was dated, and probably the same day it was taken, Levy sold to appellant for cash about \$5,700 worth of good accounts at seventy cents on the dollar; that he, appellant, knew nothing about the business of Levy & Co., and made no inquiries of any one on that subject; that he bought the accounts in question without ever having looked at the firm's books; that he also, on the same day he bought the accounts, procured from Levy & Co. another judgment note for \$1,000, at the request of one Rosenthal, which he gave to the same attorney whom he employed to take the confession of judgment on this note; that the Rosenthal note, although taken on May 28th, was dated back as of the same date of two original notes evidencing the indebtedness of Levy & Co. to Rosenthal, and that he did not think it strange that Rosen-

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thal wanted a judgment note; that he took Levy's statement that the \$5,700 of accounts of the firm which he purchased and paid \$4,000 for, were correct; that he did not suspect that anything was wrong until he heard some talk at a club on Sunday afternoon, May 29th, that Levy had conveyed a piece of his property on the West Side, though he did not know what this property was worth, had no idea of its worth, and that nothing was said in the conversation on that subject, but that this fact was the only thing that changed his mind on the subject of the firm's insolvency; that when he talked over with his attorney, as he did, on May 30th, the matter of entering judgment against Levy & Co., he did not know how much stock the firm had on hand nor how much they owed, and that he did not make any inquiries of them as to what they owed at bank.

Counsel for appellant make divers contentions which we deem it unnecessary to refer to specifically, inasmuch as in our opinion the only question to be considered is, was the County Court justified in finding, as it no doubt did find, that appellant entered his judgment in contemplation of an assignment by Levy & Co., and also that the firm gave the judgment note in contemplation of the assignment, and that appellant received it in anticipation of that event and for the purpose of procuring a preference over other creditors?

In *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584-91, the Supreme Court say:

"Notwithstanding the voluntary assignment act, a debtor, though insolvent, may still secure, by mortgage or confession of judgment, or otherwise, a *bona fide* indebtedness, if done in good faith, and not in contemplation of making an assignment under said act. When, however, the debtor enters upon a course of conduct having for its object the disposition of all his estate for the benefit of his creditors, and as part of the plan by which to effect that object executes a general assignment, the distribution must be to his creditors in proportion to the amount of their respective claims. This question was before this court in a case of very considerable importance, and there received full con-

sideration; and we then, with entire unanimity, announced the doctrine that any preference obtained by the creditor, by or through the acts of the debtor, after the debtor has determined to yield dominion of his estate by making a general assignment for the benefit of creditors, fell within the prohibition of the statute and was therefore void." (Citing *Preston v. Spaulding*, 120 Ill. 208.) "All the acts of the debtor, performed with the intent and for the purpose of effecting a disposition of all his property for the benefit of his creditors, are to be regarded as a single transaction, each constituting part of the general assignment of his assets under the statute."

In *Hide & Leather Nat. Bank v. Rehm*, 126 Ill. 465, the court say on this subject, and speaking of the insolvent's acts:

"So long as he is clearly shown to have entered upon the disposition of his property for the benefit of his creditors at the time he made the judgment notes, the law will indulge in no refinements in order to fix the precise point of time at which he reached the determination to make a general assignment. All that was done will rather be viewed as parts of the same transaction, so as to make it immaterial whether the determination to make the assignment in fact preceded or followed the execution of the judgment notes. Since the decision of this court in *Preston v. Spaulding*, 120 Ill. 208, the law must be regarded as settled in this State that, after a debtor has made up his mind to make an assignment of his property for the benefit of his creditors, all conveyances, transfers and other dispositions of his property or assets, made in view of his intended general assignment, whereby a preference is given, will be held to be within the prohibition of the statute and void, the same as though incorporated in the deed of assignment itself."

It is contended for appellant that appellee is bound by his (appellant's) evidence, because the latter testified at the instance of appellee and the creditors, since no different state of facts and circumstances were shown than that to which appellant testified. This, no doubt, would be true if the matters and circumstances testified to by the witness were not of such a nature as to justify the court in inferring, upon a consideration of the whole facts and circumstances in evidence, that the truth was the exact opposite

to the testimony of the witness. The court, having heard the witness, was in much better position to pass upon his credibility, because it could observe the manner of the witness in testifying and his conduct on the witness stand. In *Highley v. Am. Ex. Nat. Bank* (p. 48, this volume), this court said :

“The testimony of an interested witness to facts inherently improbable need not be accepted by the court or jury, although such testimony is not contradicted by any other direct testimony in the case, and although the witness is not otherwise impeached.” (See authorities there cited.)

In *Quock Ting v. United States*, 140 U. S. 417, the court, in speaking upon this subject, said :

“He (the witness) may be contradicted by the facts he states as completely as by direct adverse testimony, and there may be so many omissions in his accounts of particular transactions or of his own conduct, as to discredit his whole story.”

To the same effect is *Anderson v. Liljengren*, 52 N. W. Repr. (Minn.) 219.

As to the matters of the insolvency of S. Levy & Co. when the judgment note was given, and appellant's knowledge thereof, and also as to Levy & Co. in giving, and appellant in receiving, the judgment note and entering judgment thereon, all being done in contemplation of and as part of the general assignment, we are of opinion that the judgment of the County Court is not manifestly against the evidence.

It was also claimed that the County Court had no jurisdiction in the matter. This is settled to the contrary by *Atlas Nat. Bank v. Moore*, 152 Ill. 528, and cases there cited.

It is also claimed that the County Court admitted improper evidence, and that this is a cause for reversal. Where the hearing is before the court, as in this case, it will be presumed that the court, in reaching its conclusion, rejected all incompetent and only considered the competent evidence before it. *Hobart v. Hobart*, 53 Ill. App. 133.

It is further contended that the creditors were improper parties in this proceeding. If that contention be tenable, which we do not decide, as it is unnecessary, we are unable

to perceive in what way the fact of their being parties could in any way prejudice appellant.

The judgment of the County Court is affirmed.

Caleb Chase et al. v. Ellen Tuckwood.

1. JUDGMENT BY CONFESSION—*When Collusively Entered.*—A judgment by confession collusively entered, no indebtedness whatever existing, is fraudulent and void, and can be attacked by any one whose interests are adversely affected by it.

2. SAME—*Where the Judgment Debtor Alone Can Impeach It.*—Where there is actual indebtedness secured by a judgment note, a judgment thereon is not void, and the judgment debtor only can impeach it.

Attachment, intervening petitions, etc. Appeal from the Superior Court of Cook County; the Hon. GEORGE A. TRUDE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

Statement.—Appellants sued out a writ of attachment in the Circuit Court against a corporation known as the Bombay Tea Company, under which the sheriff levied upon certain of the company's property. The same day a judgment by confession was entered in the Superior Court against said company, in favor of the appellee, and levied upon the same property.

The property so levied upon was sold in due course, and the proceeds remained in the hands of the sheriff, awaiting an order of court to determine the rights of the respective parties in connection therewith. Subsequently the Superior Court granted to appellants leave to file their intervening petition in the case in which the judgment by confession had been entered, which was done. This petition alleges fraud and collusion between the appellee and the judgment debtor, and prays that the judgment lien be postponed, subject to the lien of the attachment writ. Appellee herein thereupon, after his motion to strike the petition from the files had been denied and a demurrer overruled, answered the petition, alleging that the judgment note in question was given to secure payment of \$1,600

loaned to the Bombay Tea Company by her, through her son, the president of said company. Upon a hearing of the petition on the merits, the court found the allegations of fraud, collusion and want of consideration not sustained, and denied appellants the relief prayed for by their petition.

There was evidence tending to show that appellee furnished money to start her son in a retail tea and coffee business, which was conducted by him under the name of the Bombay Tea Company before it was incorporated. The loans thus made by appellee to her son amounted to \$900 before the incorporation, and she subsequently loaned him \$700 more after incorporation, which money he states was used in the business of the Tea Company, of the stock of which he was sole owner. She testifies that she several times asked her son to secure her, and five days before the judgment by confession was entered he caused the judgment note to be executed. The writ of execution under the judgment, and the attachment writ, were placed in the sheriff's hands almost at the same time, the attachment having the precedence by about two minutes.

WHEELER & SILBER, attorneys for appellants.

An attaching creditor obtains such an interest and lien by levy of his attachment that he occupies the position of a judgment creditor, as far as the attachment is concerned. *Rinchey v. Stryker*, 26 How. Pr. 75; *Thayer v. Willet*, 9 Abb. Pr. 330; *Falconer v. Freeman*, 4 Sandf. Ch. R. 565; *Kelly v. Lane*, 28 How. Pr. 128; *Greenlief v. Mumford*, 30 How. Pr. 30; *Bates v. Plonsky*, 62 How. Pr. 429; *Potter v. Mather*, 24 Conn. 551; *Dodge v. Griswold*, 8 N. H. 425; *Dixon v. Hill*, 5 Mich. 404.

A stranger whose rights are affected may impeach a judgment collaterally on the ground of fraud and collusion. *Sidensparker v. Sidensparker*, 52 Me. 481; *Drexel's Appeal*, 6 Pa. St. 272; *Lowber & Wilmer's Appeal*, 8 Watts & S. 387; *Pierce v. Carleton*, 12 Ill. 358; *Black on Judgments*, Secs. 260, 293, 336; *Freeman on Judgments*, Vol. 2, Sec. 336.

Proceedings to prevent execution of a judgment constitute collateral and not direct attack upon the judgment. *Krug v. Davis*, 85 Ind. 309; *Black on Judgments*, Vol. 1, Sec. 253.

A stranger to a fraudulent and collusive judgment may attack it whenever and wherever it comes into conflict with his rights, not to have it set aside, but to render it a nullity as to him. *Dougherty's Appeal*, 9 Watts & S. 189; *Smith v. Cuyler*, 78 Ga. 654; *Black on Judgments*, Sec. 293; *Palmer v. Martindell*, 43 N. J. Eq. 90; *Shallcross v. Deats*, 43 N. Y. Law, 177; *Bryant v. Harding*, 29 Mo. 347.

A. W. FULTON, attorney for appellee.

When the court has jurisdiction of the parties and subject-matter (in the absence of actual fraud) errors and irregularities affecting a judgment can only be called in question by the debtor in a direct proceeding for that purpose. A stranger (a judgment or attaching creditor) can not interfere. *Pierce v. Carleton*, 12 Ill. 362; *Havens v. First National Bank*, 162 Ill. 42; *Kellogg v. Keith*, 4 Ill. App. 386; *Adams v. Arnold*, 86 Ill. 186; *Gardner v. Bunn*, 132 Ill. 404; *Martin v. Judd*, 60 Ill. 84; *Magnusson v. Chonholm*, 51 Ill. App. 476; *Freydendall v. Baldwin*, 103 Ill. 325; *Brewster v. Riley*, 19 Ill. App. 581; *Atwater v. Exchange National Bank*, 152 Ill. 620; *Thomas v. Mueller*, 106 Ill. 36; *Burch v. West*, 134 Ill. 267; *Swiggart v. Harber*, 4 Scam. 364; *Sidensparker v. Sidensparker*, 52 Me. 481; *Lowber & Wilmer's Appl.*, 8 Watts & S. 387; *Drexel's Appl.*, 6 Pa. St. 272; *Krug v. Davis*, 85 Ind. 309.

While judgment creditors have been allowed to attack other judgments on the ground that they were void for fraud or lack of jurisdiction, it has been held, in this and other States, that an attaching creditor has not the same standing as a judgment creditor. The rule seems to be that a valid claim against the judgment debtor must be shown, and that prior and superior equities are affected before a third party may be allowed to intermeddle. *Stevens v. Newman*, 68 Ill. App. 549; *Brewster v. Riley*,

19 Ill. App. 581; Freyendall v. Baldwin, 103 Ill. 329; Kingman v. Reinemer, 58 Ill. App. 178; Martin v. Judd, 60 Ill. 84; Fort v. Fort, 9 Wend. (N. Y.) 442; Wintringham v. Wintringham, 20 Johns. (N. Y.) 295; Dodge v. Griswald, 8 N. H. 425.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Counsel for appellants discuss at considerable length in their brief the question whether the Superior Court had power to grant the relief sought by the attaching creditors in the intervening petition.

If the judgment by confession was collusively entered, no indebtedness whatever existing, the transaction would be fraudulent and void, and could be attacked by any one whose interests were thereby adversely affected. *Martin v. Judd*, 60 Ill. 78-85, and cases there cited.

It is upon such contention that appellant's attack is based. But there was evidence in this case tending to prove the existence of an actual indebtedness as consideration for the judgment note and there was no evidence disproving such claim. The judgment based upon such note can not then be regarded as void, and it is said, in the case above referred to, that only the party himself can impeach it.

The petition charged that the alleged indebtedness was fictitious, that the company was never indebted to appellee in any sum whatever, and asked the court to exclude appellee from participation in the proceeds of the sheriff's sale. The court would, it is conceded, have had power, under this proceeding, to enter into an investigation of the good faith of the claim upon which the judgment by confession was based, had the attaching creditor reduced his claim to judgment. *Brewster v. Riley*, 19 Ill. App. 581.

But it did, we think, have the power at the instance of the attaching creditors, the question being whether the judgment was absolutely void because based upon no indebtedness. If it was thus void appellee could take nothing under it, when that fact was once established. It could in such case be assailed by a stranger to the record, and the

appellants' rights under the attachment writ would be not only superior, but exclusive as against appellee. *Martin v. Judd*, *supra*; *Freydendall v. Baldwin*, 103 Ill. 325-329. See also *Havens & Geddis Co. v. First Nat. Bank*, 162 Ill. 35. The evidence, however, did not sustain the petition in this respect.

It is urged that the alleged indebtedness was not a *bona fide* debt of the corporation, but the individual debt of the president.

There is evidence tending to show that the money borrowed from appellee was used in the business of the Bombay Tea Company, part of it before the incorporation and a part afterward. The proof rests mainly upon the testimony of the president of the company, who is the son of appellee. While such testimony, under the circumstances of this case, is open to suspicion, it is not disproved, and we can not say the trial court erred in its findings. Appellee states that she loaned money to the Bombay Tea Company in response to requests from her son. If the statements of these witnesses are true, they seem to show that appellee let her son have this money for use in the business. So much of it as went into the business before incorporation was undoubtedly the personal debt of the son, and the assets of the business turned over to the corporation in payment for its capital stock may not have been chargeable with his personal debt.

The corporation paid him therefor by its capital stock, and appellee had loaned the money to him individually. But, however that may be, the loan made subsequently, if it went into the business of the company, was its own debt. This, according to the evidence, was about seven hundred dollars. The proceeds of the sheriff's sale amounted to less than three hundred dollars. The fact that the judgment was for a sum larger than the actual indebtedness is not, therefore, material. The appellants are not thereby injured. The judgment debtor may impeach the judgment but the appellants can not. *Havens & Geddis Co. v. First Nat. Bank*, 162 Ill. 35, and cases there cited.

The judgment of the Superior Court must be affirmed.

Charles A. Morrill and Richard J. Follis v. George H. Lindemann.

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1. **PRACTICE—Forms for Verdicts by Trial Judge.**—A trial judge is not obliged to prepare forms of verdict, but if he undertakes to do so upon his own motion, the forms should be as complete as the case requires, especially in cases where the jury might be misled by incomplete forms, and imperfect instructions concerning them.

2. **INSTRUCTIONS—Where There Are Several Defendants, Some of Whom May be Found Not Guilty.**—An instruction which informs the jury that they may find both defendants guilty, or neither of them, where one of them may be found not guilty, is not the law as applied to actions for malicious prosecution.

Trespass on the Case, for malicious prosecution, etc. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 5, 1899.

H. R. PEARSON and CRATTY, JARVIS & CLEVELAND, attorneys for appellants.

O. D. SWEARINGEN, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

Appellee brought his action, in trespass on the case, against the appellants for malicious prosecution and for false imprisonment, and recovered a verdict in his favor against both defendants (appellants) for \$1,000, from which a remittitur of \$250 was entered, and judgment rendered for \$750.

The controversy arose out of the larceny of a dog belonging to appellant Morrill, traced into appellee's possession.

There was evidence under which the jury might have justifiably found Morrill not guilty; and by way of illustration it may be said that under the evidence either defendant might have been found guilty and the other not.

The trial judge, however, told the jury that their "verdict should be in one of the following forms," which he gave to them in writing:

"We, the jury, find the defendants guilty, and we assess the plaintiff's damages at the sum of _____."

"We, the jury, find the defendants not guilty."

Although a trial judge is not obliged to prepare forms of verdict, yet if he undertakes to do so upon his own motion, the forms should be as complete as the case requires, especially in cases where the jury might be misled by incomplete forms, and imperfect instructions concerning them.

The jury were, in this instance, told, in effect, that they must find both defendants guilty, or neither of them, and such is not the law as applied to the case at bar. The question is preserved by apt exception, in the motion for a new trial and by assignment of error.

We can not regard the error as cured by one of the general instructions which told the jury that if they believed, from the evidence, certain things, then they might find the defendant Morrill not guilty.

Non constat the jury believed such things to have been proved, and yet felt constrained by the oral direction of the court to return their verdict in one of the only two forms the court gave them as proper for them to return. A specific instruction of that kind is much more likely to be followed by a jury than a general one.

The judgment is reversed and the cause remanded.

H. L. Whithed, Assignee, v. J. Walter Thompson Co.

1. VOLUNTARY ASSIGNMENTS—*Consideration For.*—The debts due to the creditors, and the acceptance of the trust to administer the estate for their benefit, are a sufficient consideration for an assignment.

2. SAME—*How the Assignee Takes.*—The assignee takes his title for the payment of the debts, subject to all equities, liens and incumbrances which existed against the property in the hands of the insolvent.

3. SAME—*Prior to the Statute.*—The right and power of a failing debtor to pass the title of his effects to an assignee remain as they did before the statute, but the power to control the distribution and beneficial employment of his property upon a transfer of the title is essentially different. Then the County Court had nothing whatever to do

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with the assignee or the effects in his hands as such assignee; now the effects of the assignor must in all cases be distributed ratably among his creditors, and any provisions in the deed of assignment directing otherwise will be inoperative and void.

4. *SAME—As Affected by the Statute.*—The statute restricts to some extent the common law right, but does not undertake to affect the validity of a common law assignment except as to preferences; nor does it undertake to control or direct its administration, when such assignment is made in a foreign jurisdiction. For all purposes except to the detriment of our own citizens, it is not regarded as contrary to the policy of our law to give such assignments effect here.

5. *SAME—At Common Law.*—Assignments for the payment of debts to creditors were valid at common law, and the right to make an assignment for the benefit of creditors, exists independently of the statute.

6. *SAME—By Citizens of Other States.*—A deed of assignment made by a citizen of another State, within such foreign jurisdiction, is subject to the claims of resident creditors when the property is located here.

7. *SAME—Executed in Foreign States.*—A voluntary assignment made abroad, inconsistent in substantial respects with our statute, should not be put in execution here, to the detriment of our citizens, but for all other purposes, if valid by the *lex loci*, it should be carried fully into effect.

8. *COMMON LAW ASSIGNMENTS—Made in Foreign States.*—A common law assignment for the benefit of creditors, made in a foreign State, will be presumed in this State to have been valid where made until the contrary appears. The burden is upon him who questions its validity in the State where it was made, to prove his contention.

9. *CORPORATIONS—Power to Make Assignments.*—Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may.

Bill of Interpleader.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed but not remanded. Opinion filed December 5, 1899.

Statement.—This was a bill of interpleader, filed by the Morgan Storage and Warehouse Company against appellant, appellee and others, to determine the ownership of certain property in the hands of the Warehouse Company, which is claimed by appellant, as assignee of the North Dakota Milling Co., a Dakota corporation, and by appellee, a New Jersey corporation, as creditor of said Milling Company, by virtue of a writ of attachment which it caused to be levied thereon. By an interlocutory decree, the complainant was

dismissed out of the case, and appellant and appellee were required to interplead and set up their respective claims to the property, or rather to the proceeds in the hands of the clerk of court arising from its sale, which had been ordered on petition of all the defendants. The attachment suit was by stipulation dismissed, the rights of the appellee to be adjusted in this proceeding.

It appears that April 16, 1897, the North Dakota Milling Company loaded the property in controversy, known as cream of wheat, upon a car consigned to certain parties in New York, who are now out of the case, and received from the agent of the railroad company a bill of lading in which the Milling Company was named as consignor. Three days thereafter the said North Dakota Milling Company voluntarily executed a common law deed of assignment, conveying to appellant as assignee, for the benefit of all its creditors, all its property of every name and nature, without preference. Appellant accepted the trust, and, as required by the deed of assignment, executed and delivered a bond for the sum of \$25,000, running to the judge of the District Court of the First Judicial District of North Dakota, conditioned for the faithful discharge of the trust. He at once took possession of all the assets of the insolvent company, and proceeded to administer the estate. Among other assets received by him was the bill of lading covering the carload of cream of wheat shipped by the assignor three days before. He forthwith forwarded said bill of lading, with two drafts of \$500 each attached, to the consignee named in said bill of lading. But the drafts being returned to him dishonored, appellant at once caused the carload of cream of wheat to be stopped in transit. It was found at or near Englewood in this State, and on or about May 10, 1897, appellant ordered it placed in storage with the Morgan Storage and Warehouse Company. Early in May appellant directed the Warehouse Company to ship ten cases of the cream of wheat to a customer at Buffalo, N. Y., which was done, and shortly after appellant paid the storage charges to the Warehouse Company, and demanded the

Whithed v. J. Walter Thompson Co.

remainder of the property. This demand was not complied with, apparently because a similar demand was made about the same time by the New York consignees, who had refused payment of the drafts accompanying the bill of lading. Matters remained in this situation until July 29th following, when the appellee instituted its suit in attachment, and thereupon the bill of interpleader was filed. The Circuit Court entered a decree sustaining the attachment, dismissing appellant's interplea, and ordering the money in the hands of the clerk paid to appellee.

WILBER, ELDRIDGE & ALDEN, attorneys for appellant.

LOUIS J. PIERSON, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

There is no dispute as to the material facts. It is said by appellee's counsel that prior to the levy appellant had renounced all claim to the goods. But the demand upon the Warehouse Company by appellant, and the threat that unless the property was delivered to him he would hold the Warehouse Company for conversion thereof, will not admit of any such construction.

We can not agree with appellee's counsel that the delivery of the bill of lading to appellant with the other assets pursuant to the deed of assignment, did not operate as a transfer of the assignor's interest in the property therein described. *Lewis v. Springville Banking Co.*, 166 Ill. 311. But it is needless to extend the discussion of such proposition, because the assignment deed expressly conveyed all claims, demands, property and effects of the assignor wherever situated. The shipper and its assignee were, and remained, entitled to reclaim the property described in the bill of lading, if the consignees refused, as they appear to have done, to comply with the terms of the contract in pursuance of which the shipment to them was made. The assignee did so reclaim the property. By his order it was stopped *in transitu*, having been found within the limits of this State. It was delivered on his order to the Warehouse Company, and the

latter thereafter held it as his agent. This agency was abundantly recognized when said company delivered a part of the property on the assignee's order for shipment to a firm in Buffalo, New York; and it was undisputed by the agent, until by reason of conflicting claims, the Warehouse Company became apparently uncertain as to its duties and liabilities, resulting in the filing of its bill of interpleader. The possession of the agent—the Warehouse Company—was the possession of the appellant.

It is urged on behalf of appellee that the latter had the right to seize the property under its writ of attachment, notwithstanding it was thus in possession of the assignee, because, as it is contended, the assignment is invalid. It is urged that the deed of assignment was without consideration; that appellee as a creditor never assented; that the assignee's title is subject to appellee's equity; that the courts of this State no longer recognize common law assignments, and that the assignment in this case was invalid in the State of North Dakota, where it was made.

As the decree of the Circuit Court must be reversed, we will consider briefly these various propositions.

The debts due to the creditors, and the acceptance of the trust to administer the estate for their benefit are a sufficient consideration for an assignment. *Hudson v. Maze*, 3 Scam. 578; *Halsey v. Whitney*, 4 Mason (U. S.), 214; *Lawrence v. Davis*, 3 McLean (U. S.), 177.

It is not at all necessary that appellee as a creditor should have assented to the assignment in order to make it valid against said creditor. It is not questioned that the assignment was made in good faith for the benefit of the creditors, and that the assignee is executing it in accordance with the spirit and purpose of the deed. It is true, the assignee takes his title for the payment of the debts, and subject to all equities, liens and incumbrances which existed against the property in the hands of the insolvent. *Jack v. Wiennett*, 115 Ill. 105-11. Appellee's claim against the insolvent, however, was not a lien or incumbrance upon the property assigned.

It is not accurate to say that the courts of Illinois no longer recognize common law assignments, and we find no warrant for the suggestion that a foreign assignment can not be regarded here as valid, unless administered under our statute. In *Hanchett v. Waterbury*, 115 Ill. 220-224, there is a clear statement of the effect of the statute of this State regulating assignments. It is there said:

"It is true that the right and power of a failing debtor to pass the title of his effects to an assignee remain as they did before the statute, but this is all. The power to control the distribution and beneficial enjoyment of his property upon such a transfer of the title is essentially different from what it was before the statute. Prior to its adoption the insolvent debtor could distribute his property among his creditors just as he pleased. * * * Then the County Court had nothing whatever to do with the assignee or the effects in his hands as such assignee. Such is not the case now. * * * The effects of the assignor must in all cases be distributed ratably among his creditors, and any provisions in the deed of assignment directing otherwise will be inoperative and void."

The title to the property assigned still passes in this State by the voluntary act of the debtor as by a common law assignment. But when the assignment is made the statute of Illinois steps in and controls the distribution of the assets. In *Union Trust Co. v. Trumbull*, 137 Ill. 146 (on p. 158), it is said: "Assignments for the payment of debts to creditors were valid at common law;" and it is further said that the statute of Illinois does not assume to create a right, but merely assumes to modify and regulate an existing right, "in other words, modifies and regulates existing common law rights." Such common law right to make an assignment for the benefit of creditors "exists independently of the statute." *Howe v. Warren*, 154 Ill. 227 (page 243). It can not be said, therefore, that common law assignments are not still recognized by the courts of this State.

The statute restricts to some extent the common law right, but does not undertake to affect the validity of a common law assignment except as to preferences; nor does it undertake to control or direct its administration, when such

assignment is made in a foreign jurisdiction. It does not undertake to prevent our courts from recognizing the validity of such foreign assignment, nor prevent the assignee thereunder from coming into our courts to enforce his rights as fully and freely as other non-residents. For all purposes except to the detriment of our own citizens, it is not regarded as contrary to the policy of our law to give such assignments effect here. *May v. First Natl. Bank*, 122 Ill. 551.

Nor do we find anything in those provisions of the statutes of North Dakota, introduced in evidence, which tends to sustain the claim of appellee's counsel that the assignment is invalid under the laws of that State. There is evidence tending to show there is a provision of the law of that State in force when this assignment was made which expressly provides that any transfer of property made in good faith for the purpose of paying or securing a *bona fide* indebtedness shall be valid. A common law assignment for the benefit of creditors made in a foreign State will be presumed in this State to have been valid where made, until the contrary appears. The burden is undoubtedly upon him who questions its validity in the State where it was made to prove his contention. This has not been done in this case, nor does it appear that the assignment in controversy has ever been questioned in North Dakota. There is affirmative evidence of its validity there. A lawyer of that State, called as an expert witness, states it as his opinion that a voluntary common law assignment of an insolvent corporation does not conflict with any provision of the laws of North Dakota. There is no testimony to the contrary, and we are not referred to any decisions of the courts of that State sustaining appellee's contention in that regard.

Appellee sets forth in his answer to an amended interplea certain alleged provisions of the North Dakota code, which provide, not for a voluntary assignment, but for proceedings in the nature of bankruptcy, where a person owing debts desires to obtain a discharge therefrom. The assignment is not made by the debtor, but by the clerk of court

to an assignee selected by the creditors. The filing of the petition in the District Court is apparently the only voluntary act required of the debtor. Such a proceeding is a statutory as distinguished from a voluntary assignment. *Townsend v. Coxe*, 151 Ill. 62.

It does not purport, so far as the extracts from the Dakota statute referred to in the abstract show, to exclude voluntary common law assignments. The provision of another North Dakota statute, that the rule of the common law that statutes in derogation thereof shall be strictly construed, has no application to the code of that State, but that provisions of the latter are to be liberally construed respecting the subjects to which it relates, we do not regard as prohibiting or interfering with the common law right of assignment in that State, so far as appears from anything in the record before us.

The deed of assignment in the case at bar is sufficient under our law to convey and transfer the property now in controversy. It has been held that under such circumstances, in the absence of any allegation or proof of a statute to the contrary, we must presume either that the common law obtains in the foreign State where the assignment is made, or else that the laws of that State are similar to those which prevail in this State, where the action is tried. In either case this foreign assignment would be treated as valid. *Juilliard v. May*, 130 Ill. 87 (p. 97).

The rule has been adopted in this State that "Corporations, unless restricted by their charters or by general statutes, may make assignments for the benefit of creditors to the same extent that individuals may." *Blair v. Illinois Steel Co.*, 159 Ill. 350 (p. 364). The right to make such assignment exists inherently in all corporations unless specially forbidden. *Vanderpool v. Gorman*, 140 N. Y. 563.

It remains to consider the rights of appellee as an attaching creditor seizing personal property, which, when taken under the writ, was temporarily in this State in the possession of a non-resident assignee under a valid foreign assignment. The attaching creditor in this case is a New Jersey

corporation. Both appellant and appellee are therefore non-residents.

It is the doctrine in this State that a deed of assignment, made by a citizen of another State within such foreign jurisdiction, is subject to the claims of resident creditors when the property is located here; that it is not just or fair to compel creditors in this State to go to a foreign State to receive a *pro rata* share of the debtor's property when they may have extended credit alone upon the faith of the property in this State. *Heyer v. Alexander*, 108 Ill. 385. That case is distinguished from *C., M. & St. P. Ry. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 317, on the ground that in the latter case the property was personalty, which passed by delivery, and was situated in Missouri, where the receiver was appointed; that the title vested in the latter by appointment, and the property was brought temporarily into this State without any intention of its remaining permanently, while in the *Heyer* case the property was permanently located in this State, and was here when the assignment was made. In *Rhawn v. Pearce*, 110 Ill. 330, it was held that trustees of an insolvent estate, appointed under a Pennsylvania statute, could not, as such trustees, hold property in this State, as against residents of that State who had brought their action here by attachment and garnisheed the fund. A distinction is made between voluntary assignments and assignments by operation of law.

In *May v. First National Bank*, 122 Ill. 551, the inquiry was, as in the case at bar, whether a voluntary assignment by a non-resident, of property in Illinois, for the benefit of creditors is valid as against creditors who do not reside in this State or that of the assignor. It is there said that it is a misapprehension to suppose that *Rhawn v. Pearce* is an authority to the effect that a voluntary assignment, made without the State, of property situated in this State, will be held to be invalid, as well against foreign as against domestic creditors attaching the property here.

The conclusion reached in the *May* case is thus stated:

"We do not see that there is any policy of law * * * why non-residents are not left free to execute voluntary

assignments with or without preferences among foreign creditors as they may see fit, so long as domestic creditors are not affected thereby, without objection lying to such assignments that they are against the policy of our law."

Concurrence is expressed in the rule announced in *Bentley v. Whittemore*, 19 N. J. Equity, 462, as follows:

"The true rule of law and public policy is this: That a voluntary assignment made abroad, inconsistent, in substantial respects, with our statute, should not be put in execution here, to the *detriment of our citizens*, but that for all other purposes, if valid by the *lex loci*, it should be carried fully into effect."

In *Woodward v. Brooks*, 128 Ill. 222, a voluntary assignment for benefit of creditors, without preference, valid apparently under the law of Pennsylvania, where made, is held valid here; and in the absence of claims of domestic creditors it is said that the assignee may reduce to his possession the property assigned to him within this State, and the assignment will be given effect by the courts of this State as against citizens of Pennsylvania bringing attachment suits here. It is said this rule is not in conflict with *Rhawn v. Pearce* (*supra*), as the assignment involved was not a *statutory* assignment. The latter will not be enforced against attaching creditors, even of another State. In *Juilliard v. May*, 130 Ill. 87, it was again held that "non-resident debtors may execute *voluntary* assignments with or without preferences as they may see fit, so long as *creditors in this State* are not injuriously affected thereby." To the same effect is *Townsend v. Coxe*, 151 Ill. 62.

The assignment in the case at bar accords with the policy of the Illinois statute requiring the effects of the assignor to be distributed ratably among the creditors of the insolvent without preference. But if it did not, it might still be enforced as against foreign creditors attaching the property here.

Appellee had not complied with the laws of Illinois in reference to foreign corporations doing business in this State at the time the attachment suit was instituted. Being a New Jersey corporation, and not a citizen of this

State, it can not be regarded as, nor given the rights of, a domestic creditor, as against the foreign assignee.

It might, perhaps, be doubted whether the property attached, having been brought temporarily into this State after its transfer to the assignee, and in his possession for a considerable period, was subject to attachment even by domestic creditors, under the rule as announced in *Heyer v. Alexander* (*supra*). Such creditors could not claim to have extended credit to the insolvent in another State upon the faith of the property coming temporarily into, or passing through, this State after the assignment was made. Whether, the reason failing, the rule would also fail, we need not decide. The case of *C., M. & St. P. Ry. Co. v. Keokuk Northern Line Packet Co.* (*supra*) contains expressions which may seem to leave it an open question.

There can be no doubt, however, as to the superior right of the assignee in this case, as against the non-resident attaching creditor.

For the reasons indicated, the decree of the Circuit Court must be reversed, but the cause will not be remanded.

**Edward P. Baker v. Sarah M. Mayo and Henry M. Bacon,
Trustee.**

1. **RECEIVERS—*Facts Justifying the Appointment.***—The fact that the property is scant security for the debt; that the defendants personally liable are insolvent and unable to pay; that the rents, issues and profits are by the trust deed conveyed as part of the security; that appellant is in possession and collecting said rents and profits; and that complainant will suffer loss and damage unless a receiver is appointed, are sufficient to justify the order appointing the receiver.

2. **APPELLATE COURT PRACTICE—*When the Court Will Not Consider an Assignment of Error.***—An assignment of error which applies to the refusal to vacate the order making an appointment of a receiver, which has been stricken from the record by order of this court, having been written there without leave after the transcript was here filed, will not be considered by this court.

Baker v. Mayo.

Foreclosure.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

CHARLES PICKLER, attorney for appellant.

HENRY SCHOFIELD, attorney for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal in a foreclosure case. It is claimed by appellant's counsel that the court erred in appointing the receiver; that the decree was erroneous in requiring payment of the debt in gold coin, and in allowing a master's and solicitor's fees.

It appears that appellant purchased the equity in the property involved, but did not assume or agree to pay any part of the debt secured by the trust deed, and is not liable therefor. Appellant was served with summons, and not appearing, a decree *pro confesso* was entered against him of record. The order appointing the receiver, finds the following facts: that appellant is owner of the equity of redemption; that the bill has been taken as confessed against him, his wife, and the successor in trust named in the trust deed; that all the other defendants have entered their appearance in writing and consented to the appointment of the receiver; that the property is scant security for the debt; that the defendants personally liable are insolvent and unable to pay; that the rents, issues and profits are by the trust deed conveyed as part of the security; that appellant is in possession and collecting said rents and profits, and that complainant will suffer loss and damage unless a receiver is appointed.

The facts so found by the court are sufficient to justify the order appointing the receiver.

There is nothing in the record to show that there was evidence before the court, at the time the receiver was appointed, controverting such findings.

The default taken against appellant was subsequently vacated, and he has answered. He appears to have then

moved to set aside the appointment of the receiver. The fifth is the only assignment of error which applies to the refusal to vacate the order making such appointment, and that has been stricken from the record by order of this court, having been written there without leave after the transcript was here filed. We can not, therefore, consider such alleged error.

The decree finds the amount of the principal and interest due, and directs sale of the premises unless paid, within the time prescribed, in gold coin of the United States, in accordance with the provisions of the note which the trust deed was given to secure. It is said there is error in this, but the point is not argued; nor is there any assignment of error which advises us in what the alleged error is supposed to consist. If it is meant that because the decree includes interest and so finds a larger sum due than was due at the date of the master's report, it is erroneous; no such error is assigned. If the point was properly before us, it could not be sustained. *McClain v. Weise*, 22 Ill. App. 269-272. So far as we can ascertain from the abstract, the decree makes no allowance whatever for master's fees, and we discover no error in that respect.

It is suggested by appellant's counsel that the only evidence as to the reasonableness of the allowance for solicitor's fees, is contained in depositions returned with the master's report, which are not signed, and that it does not appear that such signatures were waived.

It is said in *Jones v. King*, 86 Ill. 225: "This might have been good ground to suppress the evidence had a motion been entered in the Circuit Court for that purpose, but appellants have waived the objection by their silence." The point was not raised before the master or in the trial court.

We are asked to allow appellee statutory damages upon the ground that the appeal was taken only for delay. We are of opinion that it is not a case requiring such allowance.

The decree of the Superior Court is affirmed.

Mr. Justice SHEPARD, having appointed the receiver, did not participate in the consideration of the case here.

Western Screw Co. v. Lillie Johnson.

1. **VERDICTS**—*Will Aid a Defective Statement of a Cause of Action.*—A verdict will aid a defective statement of title or cause of action, but will never assist a statement of a defective title or cause of action.

2. **SAME**—*Where the Declaration Will Not Sustain a Judgment.*—If a declaration be so defective that it will not sustain a judgment, such objection may be availed of on appeal or error in the Appellate Court.

3. **MASTER AND SERVANT**—*Duty of the Master.*—It is the duty of a master to use ordinary and reasonable care to furnish his servant with a safe place for the servant to perform his labor, and any failure to observe such duty is negligence.

4. **SAME**—*Master Not an Insurer.*—The master is not an insurer against accident but only liable if guilty of negligence.

5. **DAMAGES**—*\$3,000 Not Excessive.*—The plaintiff, a girl between sixteen and seventeen years of age, was at work in the vicinity of a revolving shaft in a factory, and while so engaged her dress was caught by the shaft and torn off her, her ankle bone was broken, and her shin was burned over a space about two and one-half inches by one and one-half inches, and a long-continued suppurated wound followed, leaving a scar and puffiness and swelling. *It was held that a verdict for \$3,000 was not excessive.*

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

LYMAN M. PAINE, attorney for appellant.

ERNEST SAUNDERS, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The judgment of \$3,000 appealed from was rendered upon the verdict of a jury in a suit by appellee to recover damages for an injury to her person.

Appellee worked for appellant in its screw factory, and the duties of her employment required her to stand near a long shaft about two inches in diameter, that revolved about nine inches above the floor.

This shaft extended along under a row of tables, bolted together, upon which stood fourteen machines that shaped

screws. The power that operated the machines was transmitted by the shaft. The top of the tables was two feet and seven inches from the floor, and the conductor or feeder along which the unfinished screws were carried to the dies, was two feet above the tables. The tables were two feet and seven-eighths of an inch wide. The shaft ran under the center, lengthwise, of the tables, and the conductor ran over the center of the tables, directly in a line with the shaft. Appellee's duty was to watch and keep the blank screws moving properly along the conductor, and if any of them got crosswise she would reach up with a little rod and straighten them out so they would be properly fed to the dies.

Appellee, at the time of her injury, was between sixteen and seventeen years of age, and had worked in such employment about two and one-half days. While so engaged her dress was caught by the shaft and torn off her, her ankle bone was broken, and her shin was burned over a space about two and one-half inches by one and one-half inches, and a long continued suppurated wound followed, leaving a scar and puffiness and swelling.

Appellee testified that one of the blank screws got turned in the feeder, and, as she wasn't tall enough, she was obliged to stand on her tiptoes to reach it, and while in that position her dress was caught. Nobody else who testified appears to have seen her at that moment, although another witness testified that to reach the conductor "she had to stand on her tip-toe and reach away over." A "floorman" for appellant, testified that immediately before he heard appellee scream, he saw her "lying across the machine talking to Miss Entwistle"—a girl at work at the opposite side of the machine. The girl alluded to was called in rebuttal and denied that appellee and she were talking together at the time.

Appellant's chief reliance in argument is that the declaration does not state a cause of action. The declaration consists of three counts, abstracted as follows:

"First count. Whereas, July 14, 1895, at Cook county, defendant was owner of a machine, and plaintiff was in the

employ of defendant, and was engaged about the operation of said machine under the direction of a certain foreman of defendant, and it was the duty of defendant to provide a safe place for plaintiff to pursue said employment, yet defendant did not regard its duty, but did not provide a safe place, and said defendant, by its foreman, ordered and directed plaintiff to stand and operate said machine at and near a certain shafting, then and there being attached to said machine at a short distance, to wit, two feet from the floor, and which shaft was revolving at a high rate of speed; and while plaintiff was in the exercise of all due care, and while said shaft was so revolving, and while plaintiff was engaged in the duties of her said employment, the dress worn by plaintiff became entangled with and attached to said shafting, and was wrapped around said shaft, and plaintiff was drawn to said shaft and was violently thrown to the floor under said shafting, and divers bones of her body were broken, to wit, the bone of her right leg, and plaintiff suffered divers internal injuries, and became sick and sore, and so remained for a long space of time, to wit, hitherto, and was hindered from attending to her usual affairs, and did expend divers sums endeavoring to be cured.

Second count. Same as first, with the following additional allegations: Which said shafting was not boxed or otherwise enclosed, and around which the dress of females was liable to become and had previously been wrapped, and injuries had resulted therefrom, of which said defendant had notice and of which plaintiff was ignorant. Was the duty of defendant to provide a safe place and to box or otherwise enclose said shafting, yet defendant did not regard its duty, and did not box or otherwise enclose said shafting.

Third count. Same as first, with the following additional allegations: Plaintiff was a minor, and was inexperienced in the dangers of said employment. Was the duty of defendant to provide a safe place, and to give plaintiff due caution and instruction of the danger of said employment and position; yet defendant did not regard its duty and did not give plaintiff due caution and instruction of the danger of said employment and position."

Probably the declaration is defective by way of omission in its statement of the cause of action, but we do not think it fails to state, though defectively, a cause of action.

The rule laid down by Chitty, and quoted in *Chicago & E. I. R. R. Co. v. Hines*, 132 Ill. 161, is, in substance, that though a declaration be defective and subject to demurrer,

yet if the issue joined be such as necessarily requires, on the trial, proof of the defectively stated or omitted facts, without which it is not to be presumed the judge would sanction or the jury give the verdict, the defect or omission is cured by the verdict. As otherwise stated by the same writer, a verdict will aid a defective statement of title, or cause of action, but will never assist a statement of a defective title or cause of action. Hines case, *supra*.

The declaration here was not demurred to, but was joined issue upon, and its defects are now sought to be taken advantage of by the motion in arrest of judgment made below, and upon an assignment of error here. If a declaration be so defective that it will not sustain a judgment, such objection may be availed of in the manner pursued. Hines case, *supra*.

But to be so reached, the objection must be because of a failure by the declaration to state a cause of action, for if the declaration be only defective in its statement of the cause of action, such defect has been cured by the verdict.

The particular objection to the declaration, pointed out, is that it alleges the defendant did not provide a safe place for the plaintiff to work in, whereas the law only requires a reasonably safe place to be provided. Manifestly, such is a statement that is cured by the verdict under the rule above referred to, and however obnoxious it may have been to a demurrer, because of being a defective statement of a cause of action, it can not be urged under a motion in arrest, which can reach the declaration only in case that which is attempted to be stated does not constitute a cause of action.

The averred breach of duty, generally stated, being supplemented by a statement of facts alleged as constituting the specific negligence complained of, we fail to see wherein a good cause of action was not stated, or why the motion in arrest of judgment was not properly denied. When facts are alleged which show negligence as matter of law it is not necessary in pleading to characterize them as negligent.

The jury were instructed, in behalf of plaintiff, that "as a matter of law it is the duty of a master to use ordinary

and reasonable care to furnish his servant with a safe place for the servant to perform his or her labor, and any failure to observe such duty is negligence," etc. Such instruction is not subject to any criticism urged against it.

On behalf of defendant, the jury were instructed that the plaintiff was not an insurer against accident, but only liable if guilty of negligence, and if the defendant provided a "reasonably safe place" for the plaintiff to work in, and if the shafting was located so as to furnish "reasonable protection," and if plaintiff was of sufficient age to understand and appreciate danger, and had been informed, etc., she was not entitled to recover.

We must, therefore, hold that the jury were correctly instructed upon the law in such respects.

It is too plain for discussion that no error was committed in sustaining an objection to the question asked plaintiff, upon her cross-examination, as to whether her opinion would be changed, in a particular respect, if somebody else should appear and testify to a fact differently from what she had done.

It is urged that the damages are excessive. The amount of damages is a question of fact to be determined by the jury, and may not ordinarily be disturbed by a court of review. A physician testified that in his opinion the condition of her leg would never improve, and that it will interfere, if not entirely prohibit, an occupation by her requiring a standing position. The plaintiff testified that when she worked down town in a store her limb or foot swelled so much that she had to walk around the store barefooted, and that it swells "all up" if she walks very much. It is sufficiently disclosed by the record that the girl must make her living in the pursuits of an ordinary working-girl, if at all, and to be debarred from an occupation requiring her to walk or stand much of the time is a very serious loss to her. Observing no indication of passion or prejudice in the verdict, it must stand.

A cause of action was stated, the jury have passed upon the facts, and by necessary intendment of the verdict, have

found that the plaintiff was in proper care for her own safety, and that the defendant was guilty of negligence; and for anything made to appear, there remains nothing for this court but to give effect to the judgment, and it is therefore affirmed.

Chicago and Alton Railroad Co. v. George C. Eselin.

1. **PLEADING—*In Actions for Personal Injuries.***—In an action to recover for personal injuries, the plaintiff must aver and prove (1) that the defendant was guilty of negligence (or of an omission of duty amounting to negligence), and (2) that the plaintiff exercised due care and caution for his own safety.

2. **SAME—*Defects in the Declaration for Personal Injuries.***—If a declaration in an action for personal injuries omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure that defect.

3. **PRESUMPTIONS—*After Verdict.***—The court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleadings, was duly proved at the trial. And such presumption must arise from the united effect of the verdict, and the issue upon which such verdict was given. On the other hand, the particular thing which is presumed to have been proved must always be such as can be implied from the allegations in the record, by fair and reasonable intendment; and on the other hand, a verdict for the party in whose favor such intendment is made is indispensably necessary.

4. **VERDICTS—*What is Aided By.***—A verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action.

5. **APPELLATE COURT PRACTICE—*Sufficiency of the Declaration.***—The question of whether the declaration discloses a cause of action is always a question open to consideration in a court of review, when it falls within any of the assignments of error.

6. **PRACTICE—*Disregarding Defective Counts.***—If one or more of the counts in a declaration are faulty, the defendant may apply to the court to instruct the jury to disregard such faulty count or counts.

7. **INSTRUCTIONS—*Disregarding Defective Counts.***—Where there are defective counts in the declaration it is error in the court to refuse to instruct the jury to disregard them.

8. **SAME—*Where the Declaration Contains Defective Counts.***—An

instruction which informs the jury that the plaintiff must prove each and every material allegation in the declaration, or some count thereof, before he can recover, is erroneous when the declaration contains defective counts.

9. **AMENDMENTS**—*After Verdicts Presenting New Issues*.—It is not within the province of the trial court to allow an amendment, after verdict, which presents a new issue, to determine which involves the decision of a contested question of fact, and then to at once enter judgment thereon against the objection of the defendant, without submitting such contested question of fact to a jury.

Action for Personal Injuries.—Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed November 7, 1899.

T. J. SCOFIELD, attorney for appellant.

In personal damage cases the burden of proof is upon the plaintiff to aver and prove affirmatively that the injured person was in the exercise of ordinary care to avoid injury at the time of the accident. *Calumet Iron & Steel Co. v. Martin*, 115 Ill. 368; *Ill. Cen. R. R. Co. v. Nowicki*, 148 Ill. 32; *C., B. & Q. R. R. Co. v. Levy*, 160 Ill. 384; *Kepperly v. Ramsden*, 83 Ill. 356; *C., B. & Q. R. R. Co. v. Gregory*, 58 Ill. 279; *C., B. & Q. R. R. Co. v. Gunderson*, 74 Ill. App. 358-9.

When a declaration is amended in matters of substance defendant should be permitted to plead *de novo*. *Yates v. French*, 25 Wis. 661; *Gill v. Young*, 88 N. Car. 58; *Harney v. Applegate*, 57 Cal. 205; *Green v. Gill*, 5 Mass. 379; *Stanton v. Kenrick (Ind.)*, 35 N. E. Rep. 19; *Nelson v. Akeson*, 1 Ill. App. 165; *Harper v. I. C. R. R. Co.*, 74 Ill. App. 75; *Penn. Co. v. Sloan*, 125 Ill. 75; *Schultz v. Fox*, 53 Md. 37.

In the absence of a law or ordinance governing the rate of speed a company may operate a train at any rate consistent with safety of travelers upon the highway and with property entrusted to it for carriage and its employes operating its train. *I. B. & W. R. R. v. Hall*, 106 Ill. 375; *C. & N. W. R. R. v. Dunleavy*, 129 Ill. 151; *Partlow v. Ill. Cen. R. R. Co.*, 150 Ill. 321.

JOHN W. BYAM and F. M. BURWASH, attorneys for appellee.

The alleged defect in the declaration is that it failed to allege due care on the part of the plaintiff. This was cured by verdict. *Gerke v. Fancher*, 158 Ill. 380; *B. & O. S. W. Ry. Co. v. Then*, 159 Ill. 536.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

The declaration in this case contains three counts. We express no opinion as to the first and second counts.

The third count alleges that the defendant was the owner of and operated a certain railroad, in part in this county, and was the owner of a certain yard used by it in the transaction of its business; that February 12, 1894, plaintiff was in the employ of defendant as fireman on switch engine No. 211; that the trainmaster, who was not a fellow-servant of plaintiff, ordered the train, on which plaintiff was acting as fireman, to go to the upper end of said yard; that to reach the place to where said train was ordered it was necessary for it to cross the main track, owned and operated by the defendant; that the engine on which plaintiff was fireman started with its train of cars to the place where it had been ordered by said trainmaster; that while said engine on which said plaintiff was, as aforesaid, upon said main track, in motion crossing the same, two engines coupled together, and known as a double-header, with a snow plow attached, came along in full motion on said track and struck the engine on which plaintiff was acting as fireman, as aforesaid, with great force and violence, and thereby the plaintiff was thrown out of said engine upon the ground and greatly injured, such injury being stated.

Said third count contains no averment whatever of any negligence or omission of duty by or on the part of the defendant, or any person or persons in its employ or acting for it. In fact, that count makes no reference to, or averment of, any negligence or omission of duty by any one, anywhere, or at any time. Neither does it aver that any

duty of any kind rested upon anybody. Hence there is nothing which can be cured by verdict.

Neither is there any averment in said count that the appellee was in the exercise of ordinary care for his own safety.

The verdict of the jury was rendered June 8, 1898. Thereupon appellant filed in said cause its motion for a new trial. July 2, 1898, during the argument upon the motion for a new trial, counsel for appellee moved the court for leave to amend the declaration and each count thereof. Against the objection of appellant, and to which appellant then and there excepted, the court sustained said motion for leave to amend. The same day, July 2d, amendments to each count of the declaration were filed. The motion for a new trial was overruled and judgment upon the verdict entered.

Whether it was error, as urged by appellant, to enter judgment upon the amended declaration without a plea, such amendments having been made after verdict, we shall not here stop to consider. The amendments, however, are not sufficient to cure all the fatal defects in the third count. The lack of any averment that appellee was exercising due care and caution for his own safety is supplied by the amendment, but there is still no averment of any negligence on the part of appellant, or of any duty resting upon it from which any negligence might be inferred, as of any failure on its part to meet every obligation of duty which it owed to appellee.

The law is well settled in this State that in an action to recover for personal injury, the plaintiff must aver and prove (1) that the defendant was guilty of negligence or of an omission of duty amounting to negligence, and (2) that the plaintiff exercised due care and caution for his own safety. When this cause went to the jury there was no averment in said third count of either of these necessary prerequisites to a right of recovery. The defendant might have admitted the truth of every averment in that count, and yet plaintiff would not have been entitled to recover

thereon, and that is true as to said count after it was amended. It was still fatally defective for want of any averment as to negligence on the part of appellant.

"If a declaration omits to allege any substantial fact which is essential to a right of action, and which is not implied in or inferable from the finding of those which are alleged, a verdict for the plaintiff does not cure that defect." *Bowman v. People*, 114 Ill. 474, 477.

And the Supreme Court in that case quotes with approval, from *Chitty on Pleadings*, this:

"The expression cured by verdict signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated, or omitted in the pleadings, was duly proved at the trial. And such intendment must arise, not merely from the verdict, but from the united effect of the verdict and the issue upon which such verdict was given. On the one hand, the particular thing which is presumed to have been proved, must always be such as can be implied, from the allegations in the record, by fair and reasonable intendment; and on the other hand, a verdict for the party in whose favor such intendment is made is indispensably necessary."

It certainly can not be successfully contended but that the count in question omits to allege a substantial fact essential to a right of recovery, and which can not be implied or inferred from a finding of those facts which are alleged. Therefore the verdict for the plaintiff does not cure that defect. There is no "united effect of the verdict and the issue upon which such verdict was given," if given upon the count in question.

As very tersely stated in *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161, 166, "The rule is that a verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action."

Tested by this rule said third count is fatally defective, even after the amendment. This is not for the reason that there is a defective statement of any negligence on the part of appellant, but because there is no statement whatever as to this essential element in a cause of action.

The question of whether the declaration discloses a cause of action is always a question open to consideration in a court of review, when it falls within any of the assignments of error. (*O. & M. Ry. Co. v. Wachter*, 123 Ill. 440, 443.)

The appellant, by its motion to instruct the jury, its motion for a new trial, its motion in arrest of judgment, and its assignment of errors, has preserved its right to have the sufficiency of the third count to sustain the verdict reviewed by this court.

As before stated, said third count is not sufficient, even as amended, to sustain the verdict in this case. But there are two other counts in the declaration. For our present purpose, we assume that they are sufficient to sustain the verdict.

Sec. 50, Ch. 110, Rev. Stat. of Ill., is as follows :

"If one or more of the counts in a declaration be faulty, the defendant may apply to the court to instruct the jury to disregard such faulty count or counts."

The defendant (appellant) applied to the court to instruct the jury as provided in this section of the statute. The instruction asked for that purpose is as follows :

"22. The court instructs the jury to disregard the third count of the declaration."

That instruction the court refused to give. That was refusing to grant to the appellant a right secured to it by the statute.

At the instance of appellant the court gave to the jury the following instruction, viz. :

"9. The court instructs the jury that the requirement of the law that the plaintiff shall prove each and every material allegation in his declaration, or some count thereof, before he can recover, is one of the requirements that is as binding upon you in this case as any other obligation. And even in this case, if you should believe that the testimony is evenly balanced, and that the defendant's testimony is of equal weight to that of the plaintiff, then, under the law and your oaths, your verdict should be for the defendant."

These two instructions must be construed together. When taken together, they would say to the jury that the

plaintiff must prove every material allegation in his declaration, or some count thereof, before he can recover, but the jury will disregard the third count. In other words, that would be saying to the jury that if the proof sustains the material allegations in the first and second counts, or either one of said counts, then the plaintiff is entitled to recover, but he can not recover under the third count. The result is the same as though both these instructions had been embodied in one and the court had modified that by striking out the part which pertained specifically to the third count. That was in effect saying to the jury that, in law, plaintiff was entitled to recover if each and every material allegation of the third count was proven.

But as shown, that count, even as amended, simply sets out what constituted an accident, and only an accident. It does not assume or pretend to state who caused it, or who, if any one, was negligent or otherwise at fault. It is not a sufficient reply to this to say that appellant requested the court to give said ninth instruction, and therefore it can not complain. It was asked only in connection with the twenty-second instruction. The giving of the ninth instruction was not asked by appellant, unless the court also gave the twenty-second. The giving of one without the other was not instructing the jury as requested, and, if erroneous, appellant may properly urge the error.

As we have said, the third count, as it was before amendment, was clearly insufficient to sustain a verdict. This was practically conceded by counsel for appellee when, upon the argument of the motion for a new trial, they asked leave to amend, and by leave of court did then and there amend said count. By the instructions of the court this jury was told, in effect, that if they believed from the evidence that appellee had proven all the material allegations contained in the third count, then he was entitled to a verdict in his favor. A verdict in his favor was returned by the jury. Whether, as a matter of fact, that verdict was rendered because the jury found the allegations of the other counts to be sustained by the proof, or because they

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found the allegations of the faulty count, and these only, to be thus sustained, of course does not appear. Whether, as a proposition of law, it will be now presumed that the verdict was based upon the counts assumed to be good, we do not here determine. By the amendment a further and necessary averment of fact was made. Whether this amendment stated the situation correctly was, as appears from the testimony, a contested question of fact. That issue was not presented to the jury. It was not in the case at the time of the trial. It is not within the province of the trial court to allow an amendment, after verdict, which presents a new issue, to determine which involves the decision of a contested question of fact, and then to at once enter judgment thereon against the objection of the defendant, without submitting such contested question of fact to a jury. It is in many cases within the province of the court to allow amendments to the declaration to be made after verdict. But not so where such amendment presents a new issue upon a contested question of fact. In this case there were several other amendments allowed at the same time this one was made, which were proper after verdict.

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded.

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Thomas S. Desmond v. Sarah M. Lanphier.

1. **DELIVERY**—*An Indispensable Element to a Conveyance.*—Delivery is an essential and indispensable element to the conveyance of lands by deed, for the reason that a deed takes effect only from the delivery.

2. **SAME**—*As to Mortgage.*—A mortgage takes effect only from the time of its delivery.

3. **SAME**—*Recording Not Equivalent.*—Although a deed has been recorded, if it has not been delivered, or the delivery was unauthorized, a subsequent conveyance by the mortgagor or a subsequent judgment against him will take precedence.

4. **MORTGAGE**—*Condition Performed—Subsequent Incumbrancer.*—Where the condition of a mortgage has been performed, a subsequent

incumbrancer has the right to avail himself of the advantage and not to be postponed to equities newly created, which, in fact, are subsequent to his own claim.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. R. W. S. WHEATLEY, Judge, presiding. Heard in this Court at the March term, 1899. Reversed and remanded with directions. Opinion filed November 27, 1899.

Statement by the Court.—Appellee, Sarah M. Lanphier, claiming to be the owner of a note of \$3,500, dated August 20, 1888, made by Reuel W. Bridge, payable to his order and by him indorsed, due one year after date, and secured by a trust deed of the same date made by said Bridge and wife to James Morgan, trustee, and Charles Morgan, as successor in trust, conveying eighteen lots in Cheltenham, Cook county, Illinois, and which was recorded September 25, 1888, filed her bill in the Circuit Court of Cook County, on March 20, 1897, against Thomas S. Desmond, said Bridge and others, to foreclose said trust deed, because of the alleged non-payment of a balance claimed to be due on said note of \$2,100 and interest.

No defense was made by any of the defendants, although they answered the bill, except Desmond, who answered, in substance, denying that Bridge was indebted in any amount on said note; that it was made to evidence or secure any *bona fide* indebtedness existing at the time it was made; that said note was at any time delivered to said Lanphier, and alleging that, if it was delivered to her, it was not so delivered until long after the maturity thereof and after Desmond had become the owner of the real estate described in the trust deed. The answer admits the execution and recording of the trust deed, but alleges that there was no consideration therefor, and denies that the trust deed was at any time prior to the maturity of the note delivered to any *bona fide* holder, and denies that it ever became effective as a lien as against said Desmond. The answer also admits the charge in the bill that he, said Desmond, has an interest in said real estate, and alleges that he is the owner thereof in fee simple, and that the same is not subject to the lien of said trust deed. Replications to the answers were filed.

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Desmond also filed a cross-bill against said Lanphier and the other defendants to the original bill, in which is alleged, in substance, the same matters set up in his answer, and the details as to how he became the owner of the premises in question, and praying that said trust deed be decreed to be surrendered and canceled, and declared not to be a valid or existing lien on said premises. The defendants to said cross-bill answered the same, to which replications were filed and the cause referred to a master to take proof and report his conclusions. The master reported, recommending a decree of foreclosure of said trust deed for the amount found by him to be due thereon, viz., \$3,703, and that the cross-bill of said Desmond be dismissed for want of equity.

Objections were filed to the master's report by said Desmond, which were ordered to stand as exceptions thereto, and upon a hearing before the chancellor the master's report was confirmed and a decree of sale of the real estate in question, except of three lots released by the trustee hereinafter referred to, was entered for the amount found due by the master, but no disposition is made in the decree of the cross-bill of Desmond.

It appears from the record that after the filing of the master's report and objections thereto, and on the 16th day of December, 1898, counsel for said Desmond moved the court for leave to dismiss his cross-bill, which motion was continued. Afterward, and on the same day of the entry of the decree of foreclosure, the following separate order was entered by the court, viz.: "On motion of solicitor, it is ordered that the cross-bill of Thomas S. Desmond is hereby dismissed out of this court at the cost of cross-complainant."

The appeal in this case is prosecuted by Desmond from the decree of foreclosure, and none of the other parties to the litigation, except said Lanphier, have appeared in this court.

From the evidence reported by the master, the following facts, in substance, appear, to wit:

In March, 1884, by an agreement between one Bartow A. Ulrich and said Bridge, the latter took the legal title of certain real estate, including the premises in question, in trust, upon the understanding that said Ulrich should receive one-half of the final profits which might result in dealing in said real estate, and the said Bridge the other half of such profits. In March, 1884, and after Bridge took said title, and as a part of the same transaction, Ulrich sold one-half of his interest in the profits to be derived from said real estate to Desmond, for which the latter gave to Ulrich a note of the Franklin Printing Company of \$3,000, dated December 19, 1883, payable to the order of Desmond in one year, and by him indorsed, the note being executed by Desmond as president of the Printing Company, and also by the secretary of the company. This note was immediately transferred by Ulrich to Bridge, in consideration of Bridge conveying a quarter interest in the profits of said real estate to Victoria Ulrich, a daughter of said Bartow A. Ulrich, and a further payment of \$1,500 by said Bridge to said Bartow A. Ulrich. Said note of the Printing Company was also secured by a chattel mortgage of that company on certain personal property. As the result of this transaction, Bridge held the title in fee simple of said real estate in trust, to pay the profits arising from dealing therein, one-quarter to each, Bartow A. Ulrich, Victoria Ulrich, said Desmond, and to retain one-quarter for himself.

When said Printing Company note became due, it was owned by Bridge, who, by agreement with Desmond, renewed it by a new note of the Printing Company, dated December 19, 1884, payable to the order of Desmond, on June 19, 1885, and indorsed and guaranteed by Desmond. As collateral to this last note, Desmond also made and delivered to Bridge his individual note, dated December 18, 1884, for \$2,000, payable to Bridge, one-half on March 1, 1885, and the balance on April 1, 1885, with interest at eight per cent per annum, to secure which Desmond also made and delivered to Bridge a chattel mortgage of the same date, conveying two buildings on leased ground. No

payment was ever made by Desmond to Bridge upon this note of \$2,000, or to any one else, nor has he ever been asked to make any payment thereon. Bridge claims to be still the owner of the note and mortgage, but that they have been lost or misplaced. They were not produced on the hearing. When the note of the Printing Company, which became due June 19, 1885, matured, Bridge took a third note of the Printing Company, executed by Desmond, as president, and C. E. Page, as secretary, for the sum of \$3,000, dated June 19, 1885, payable to the order of Bridge, \$1,000 in three months, \$1,000 in six months, \$900 in nine months, and \$100 in twelve months, respectively, after date, with interest at eight per cent per annum, payable quarter-yearly, and providing that default in any installment should mature the whole note, if the holder should so elect. This last note was also secured by a chattel mortgage of the Printing Company to Bridge, and is indorsed with divers payments of interest up to March 19, 1886, and payments of principal of \$765 and \$204.34, stated to be proceeds of sale of property covered by the mortgage, and a further indorsement, as follows: "Amt. due as of June 9, 1886, \$2,074.47."

August 20, 1888, Bridge made his note for the sum of \$3,500, of that date, payable one year thereafter to his own order, and indorsed by him, bearing interest at seven per cent until maturity, and eight per cent after maturity, and to secure the same, he, together with his wife, made and acknowledged a trust deed of the same date, conveying to James Morgan, as trustee, eighteen lots, being part of the property so held in trust by him. This trust deed was recorded September 25, 1888. At divers times thereafter Bridge used this note and trust deed as collateral to secure loans of money and indebtedness by him to divers persons, all of which loans he paid, and after the payment of each, the note and trust deed were returned to him. This note and trust deed were in his possession in the month of May, 1894, and did not at that time secure any loan to Bridge, or indebtedness by him or by any one else.

The note is indorsed with two payments, one of \$500, July 20, 1889, and one of \$900, December 31, 1889, and also shows indorsements of interest paid thereon up to January 1, 1891, and extensions of payment thereof from time to time to January 1, 1891.

February 9, 1889, there was executed by the said Ulrich, his daughter and Desmond, a statement in writing, purporting to show the final profits and interest of each of the parties in said real estate, held by Bridge in trust. This statement recites that the share of Desmond in said profits was \$4,718.63, and that he was entitled to have conveyed to him such parts of said real estate, clear of incumbrance, subject to taxes and assessments of 1888, as he might select, at the schedule prices of the real estate, fixed by said statement up to the amount of said profits coming to him. Bridge indorsed thereon his written assent to this statement, and thereby agreed, on his part, as trustee and individually, to carry it out, except as to certain lots not now in question, which had been sold. Thereafter, on February 18, 1889, Desmond notified Bridge in writing that he had selected eighteen lots, the total value of which, at the schedule prices by said statement, amounted to \$4,500, and demanded of Bridge a conveyance thereof, according to his agreement, and that he pay the balance of Desmond's share of said profits, to wit, \$218.63 in cash. The lots so selected by Desmond were the same lots conveyed by Bridge in the trust deed to Morgan of August 20, 1888.

Thereafter, on March 21, 1889, in compliance with the demand of Desmond, Bridge and wife made and delivered to Desmond a deed of conveyance of the lots so selected by Desmond. This deed is made out upon a printed form of deed, commonly known as the statutory form of quit-claim deed, which is described in the revised statutes of Illinois concerning conveyances. In the deed from Bridge to Desmond the printed word, "quit-claim," was erased with a pen and the word "warrant" written over it in the handwriting of Bridge, so that the deed, as executed,

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acknowledged and delivered, read that the grantors (naming them) "convey and warrant" to Thomas S. Desmond "all interest in the following described real estate" (describing the same). This deed was recorded March 23, 1889. At the same time this deed was made, Bridge and Desmond signed an agreement which recited, in substance, that said deed was delivered in full settlement and discharge of all claims and demands of Desmond against Bridge, in any way connected with or arising out of the real estate named in the said agreement of February 9, 1889, as far as said Desmond was concerned; that there was "still due from Bridge to Desmond \$218.64, a money claim, which, with the claim of said Bridge against said Desmond for balance of indebtedness arising out of the Franklin Printing Company debt, are to be settled hereafter."

On the hearing Bridge testified, when asked why the word "quit-claim" was stricken out of the deed and the word "warrant" inserted in its place, that he did it to warrant the interest which he had on the day that he drew or made the deed. Desmond testified that when he received the deed he supposed that the land was free and clear from all incumbrance, and did not know of the existence of the trust deed to Morgan until a month or more after he had received his deed from Bridge, and that after he found out about the trust deed, at his request Bridge made the payment of \$500, which was indorsed upon the note secured thereby, under date of July 20, 1889, by means of which Bridge secured a release from the trustee of three of the lots, which release was delivered to Desmond. This release contained the following clause, viz.: "This release in no wise to affect or lessen the lien of the said trust deed on the balance of the property thereby conveyed."

Commencing in the year 1884, and continuing up to the latter part of 1895, the appellee placed in Bridge's hands different sums of money, from time to time, to be loaned by him as her agent. The amount so placed with him by appellee, together with accruing interest, after making all

deductions to which Bridge was entitled, was on October 10, 1895, \$7,213.65. Appellee kept a box in Bridge's office, where it seems he was in the habit of placing her securities for money which he loaned for her, but she never looked among the papers to see what the securities were until the latter part of 1895. Bridge testifies that in May, 1894, when he was indebted to appellee more than the sum of \$2,100 and the accrued interest upon the note secured by the Morgan trust deed of August 20, 1888, he placed said trust deed and the note secured thereby in appellee's box of securities then in his office, and for the purpose of transferring them to her as a security for his debt then owing her. Appellee testified that she never saw the note and trust deed prior to December, 1895; that she could not tell when she first obtained them; that the first actual knowledge she had of them was in the latter part of 1895, and that they were placed in her box without her knowledge. She also testified that she never loaned Bridge any money; that she left her money with him in small or large amounts; that he was to collect the interest and let it go as principal, and that she did not collect the interest.

This note so placed by Bridge among appellee's securities had matured more than three years prior to that time. Appellee parted with no right or claim which she had against Bridge, nor did she pay any money for the note and trust deed. The property secured by the trust deed was vacant and unoccupied at the time of the making and recording of the deed from Bridge to Desmond, and also in 1894, when the note and trust deed were placed in appellee's box of securities by Bridge, and also in 1895, when appellee first had knowledge of the same.

CHYTRAUS & DENEEN, CHARLES H. HAMILL and EDWIN WHITE MOORE, attorneys for appellant.

M. B. & F. S. LOOMIS, attorneys for appellees.

MR. JUSTICE WINDES delivered the opinion of the court. From the statement preceding this opinion it appears that

at the time (May, 1894) the trust deed, to foreclose which appellee filed her bill, was acquired by her, there was no existing *bona fide* debt of its maker, Bridge, or of any one else, secured by it. It and the note purporting to be secured thereby had, previous to that time, on different occasions, been used by Bridge as collateral to secure divers claims owing by him, but when it passed into the hands of appellee the transfer was from Bridge and not from any one with whom he had hypothecated them or from any *bona fide* owner or holder. Then, and not till then, as to appellee, could the trust deed take effect. That was the time of its delivery. It then, for the first time, in favor of appellee, became an existing incumbrance upon the real estate conveyed by it, and as to her had the same effect and validity, and no other, than if Bridge on that day had made a new trust deed and note for the same amount and delivered them to her. No deed is complete without delivery. 1 Jones on Mortgages, Sec. 84, 539; 2 Id., Sec. 948; Partridge v. Chapman, 81 Ill. 137-40; Weber v. Christen, 121 Ill. 91; Sullivan v. Eddy, 154 Ill. 200-6; Skinner v. Baker, 79 Ill. 496; Schultze v. Houfes, 96 Ill. 335-44; Herber v. Thompson, 47 La. An. 803, 809; Underhill v. Atwater, 22 N. J. Eq. 21; Purser v. Anderson, 4th Ed., Ch. (N. Y.) 18; Spencer v. Fredendall, 15 Wis. 736-40.

Mr. Jones, in section 84, *supra*, says: "Without delivery there is no mortgage. It takes effect only from the time of its delivery." In section 539 the same author says: "Delivery is another incident necessary to giving effect to the mortgage even as between the parties to it. Although the deed be recorded, if it has not been delivered, or the delivery was unauthorized, a subsequent conveyance by the mortgagor or a subsequent judgment against him will take precedence." Section 948, the author says: "The condition of a mortgage having been performed, a subsequent incumbrancer has the right to avail himself of the advantage and not to be postponed to equities newly created which in fact are subsequent to his own claim." In the same section the author also says that when the original debt for which

a mortgage has been given has been satisfied, "the original mortgage can not, as against third persons especially, be dealt with as a subsisting security." The authorities cited by the author in support of these propositions sustain him.

In the Partridge case, *supra*, the Supreme Court held with regard to a mortgage which was executed by the owner of real estate to a person who was not present by himself or agent, and left the same for record, with directions when recorded to be sent to the mortgagee by mail, which was done, there was no delivery until it was mailed, and that a subsequent purchaser who took actual possession before the mortgage was delivered took a title superior to the mortgage.

In the Weber case, *supra*, it was held that the acknowledging and recording of a deed without the knowledge or consent of the grantee did not amount to a delivery. To the same effect is the Sullivan case, *supra*.

In the Skinner case, *supra*, the court says: "Delivery is an essential and indispensable element to the conveyance of lands by deed for the reason that a deed takes effect only from the delivery."

In the Underhill case, *supra*, the New Jersey court holds that "a mortgagor may again issue or negotiate a mortgage which has been satisfied, paid off or delivered to him, except as against intervening securities. The delivery of any instrument by the grantor gives it efficacy, and if he take a paper executed and once used for another purpose, its redelivery gives it again vitality."

In the Schultze case, *supra*, it was held that the lien of a trust deed, though recorded, takes effect only from the time the money is in fact received as against the equities of a third person under a prior unrecorded mortgage or trust deed; that it made no difference that the intention was that upon the payment of the money the title should relate back to the time of the recording of the deed, and that while such an intention as between the parties themselves might be carried out by the court, when the rights of third persons intervene, the intention of the parties must yield to the law.

In the Purser case, *supra*, it was held that a mortgage which had been paid could for a valuable consideration be kept alive for other purposes, but not as against the rights of creditors or third persons which had intervened. This ruling was made with reference to a second mortgage by the same mortgagor and an assignment for the benefit of creditors.

In the Spencer case, *supra*, the Supreme Court of Wisconsin held that a husband could not keep alive, for the purpose of securing a new debt, as against his wife, a mortgage on the homestead which had been paid, because it was in effect making a new mortgage and could not be valid, under the statute regarding homesteads, without the signature of the wife.

Long prior to the time appellee acquired this trust deed and note, and on March 21, 1889, Bridge had conveyed and warranted to appellant all his (Bridge's) interest in the real estate in question, which was the legal title, subject to the lien of this trust deed, then outstanding in the hands of one of Bridge's creditors. This conveyance passed Bridge's title to appellant, was recorded in the recorder's office of Cook county on March 23, 1889, and was, therefore, under the recording laws of this State, notice to all subsequent purchasers or incumbrancers claiming through Bridge. Hurd's Stat. 1897, Ch. 20, Sec. 21; Willoughby v. Lawrence, 116 Ill. 11-21; Kerfoot v. Cronin, 105 Ill. 609-18; Cunningham v. Thornton, 28 Ill. App. 58-66, and cases cited; Schultze v. Houfes, 96 Ill. 335-44.

The title having passed from Bridge to appellant, Bridge had none to convey and could convey no title in May, 1894, when he turned over to appellee the old trust deed, which then, the time of its delivery to her, became as between her and Bridge, a valid and existing deed. As to appellant, when this trust deed came back into the hands of Bridge, the debt for which it was a security having been extinguished by him, it became a nullity in equity—was the same as if it had never been made. Appellant's deed, then being of record, took precedence of all instruments or con-

veyances purporting to affect the title of the real estate conveyed by it which could be made by Bridge. As we have seen, the old trust deed could have no greater force or effect than if it had been signed on the day it was delivered to appellee. That the recording of a document which had no existence as a deed, could give it no validity as a deed, is elementary.

These facts, in our opinion, are controlling and conclusive in the decision of this case, and all other matters shown by the record are either immaterial or of no consequence, as are also the various contentions of the learned counsel in their arguments as to the law and facts governing the case. Except as hereinafter referred to we deem it unnecessary to mention specifically the numerous points made by appellee's counsel in support of the decree.

It is claimed for appellee, and several cases are cited to support the contention, that she is not required to take notice of the registry of the deed by Bridge to appellant, it being recorded subsequent to the date of record of the trust deed in question. An examination of the several cases cited (including *Miller v. Larned*, 103 Ill. 562, which seems to be principally relied on), shows that the facts and questions to be decided by the court in these cases were wholly different from the case at bar. These cases, because of the difference in their facts, are not applicable to the case of a trust deed which, like the one here in question, first had its existence as between appellee and Bridge, long after the record of the deed from Bridge to appellant, and for which appellee parted with no right and paid no consideration. The registry laws have application to subsequent purchasers and incumbrancers. Appellee is an incumbrancer and in a sense a purchaser subsequent to the record of appellant's deed. She is bound by the record of conveyances in the apparent chain of title from the grantor in her trust deed. The deed to appellant being of record, is as much a notice of his title as against Bridge as if appellant had been in possession of the lots when the trust deed was transferred to her. 1 *Jones on Mort.*, Sec. 458 and 710; *Schultze*, *Kerfoot* and *Cunningham* cases, *supra*.

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It is further claimed that appellant, by obtaining the release from Bridge of certain lots covered by the trust deed, which release stated that it should in no wise affect the lien of the trust deed on the remainder of the property thereby conveyed, acknowledged the validity of the trust deed, and can not now be heard to deny its validity. The trust deed was then outstanding as security of a debt due by Bridge, and was a lien which appellant could not then question as against Bridge's then creditor, who was secured by it. When Bridge extinguished the debt, as he afterward did, that was the end of the lien of the trust deed as to appellant.

It is also claimed that the dismissal of appellant's cross-bill, not purporting to be without prejudice, is therefore, for want of equity, *res judicata* and a bar. We think a consideration of the whole record shows that the dismissal was the voluntary act of appellant at a time when he had a perfect right to dismiss his cross-bill without the consent of the defendants thereto, and is in no way an adjudication against appellant. The chancery act, Sec. 36, Ch. 22, Rev. Stat., has no application to this case.

The decree of the Circuit Court is reversed and the cause remanded with directions to enter a decree dismissing appellee's bill for want of equity at her cost. She will also pay all costs in this court.

F. M. Madison v. N. H. Henderson.

1. **PARTNERSHIP**—*Suits for Breach of the Contract After Dissolution by Mutual Consent.*—A suit by one partner against another for damages occasioned by a breach of the partnership contract can not be sustained where the partnership was dissolved by mutual consent of the parties.

2. **SAME**—*Settlement by Arbitration as a Bar to a Suit for a Breach of the Partnership Contract.*—A settlement by arbitration as provided by the partnership agreement is a bar to a suit by one partner against the other for a breach of the partnership agreement.

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Assumpsit, for a breach of a partnership agreement. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 5, 1899.

W. P. BLACK, attorney for appellant.

J. M. LONGENECKER, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The parties to this suit associated themselves together as partners for the practice of medicine and surgery, and reduced their agreements in respect thereof to writing, March 1, 1887. The material stipulations and agreements of said writing, are, so far as matters here involved are concerned, as follows:

"Said party of the second part (Henderson) expressly agrees to devote his entire time to the business, in whatever capacity the party of the first part may choose to place him, whether in canvassing for cases, contracting, treating or operating alone or in assisting in such operations, in any of the offices in any State the said Madison may select. It is further agreed that in case the said Henderson fails to comply with, or fails to perform his part of this contract, in such case the said Henderson shall pay to said Madison the sum of two thousand dollars (\$2,000) for damages and inconveniences to said Madison. * * *

It is also mutually agreed by and between said parties that in case of any differences between said parties in the settlement of any partnership affairs or in the conduct of said partnership, that all such matters shall be submitted to two arbitrators, one of whom shall be selected by each of said parties, to whom shall be referred all of said differences, and whose award shall be final and binding on said parties, and if said two arbitrators can not agree, they shall select a third arbitrator and an award by two of such arbitrators shall be binding upon such parties and a full and complete settlement or adjustment of the matter or matters submitted to said arbitrators by said parties; and the said award shall, at the option of either of said parties, be made a judgment or decree in either the Circuit or Superior Courts of Cook County; and for that purpose the said parties do hereby authorize any attorney at law of said county to

appear in said court or either of them, and for us, and in our name or in the name of each of said parties and the consent of our said attorney to the entry of such judgment or decree upon said award as may be rendered in manner stated as aforesaid."

The partnership lasted only a few months, and Madison, as plaintiff, brought suit in June, 1887, to recover damages from Henderson for an alleged breach of the partnership agreement by withdrawing from the partnership and refusing to longer continue therein.

To the declaration, the appellee filed the general issue, and a special plea setting up that in April and May, 1887, an arbitration had been had under the provisions of said partnership agreement, and that the arbitrators had awarded that neither party was entitled to any damages.

Subsequently, all special pleadings were withdrawn, and the case was submitted upon the declaration, general issue, and joinder thereon, it being stipulated that all matters of defense might be shown under the plea of the general issue, that would have been proper under any special plea, and that all matters answering the defense might be shown which would be competent under proper replication.

A jury trial was afterward had and the issues were found for the defendant, and a judgment for costs against the plaintiff followed, from which this is an appeal.

Under the evidence, the defense rested upon one, or both, of two theories: (1) a dissolution of the partnership by mutual consent of the partners and a full settlement of all matters between them, or (2) a settlement by arbitration as provided by the partnership agreement.

A full consideration of both questions satisfies us that the finding of the jury was justified under either theory of defense. But because of a delayed docket, we will speak in detail of only the defense that the partnership was dissolved and its affairs adjusted by mutual consent of the partners.

It was shown by the testimony of appellant that at about the time of its date, he received from appellee the following letter:

"CHICAGO, October 8, 1887.

DR. F. M. MADISON:

DEAR SIR: I hereby notify you that I have determined to dissolve the co-partnership heretofore existing between us. I will proceed to treat all cases now in hand, and to collect accounts due the firm, accounting to you for your share of such moneys, without further charge to you for my services.

Yours truly,

N. H. HENDERSON."

And appellant testified that after the date of that letter, appellee had exclusive charge of the closing up of the firm business, including the collection of all accounts due, and that after that time the firm, as such, did no business.

Again, as late as April 14, 1888, appellant received from appellee a receipt as follows:

"CHICAGO, April 14, 1888.

I have received and hold for collection the following notes and accounts due F. M. Madison and myself as co-partners, to wit:

(Here follows list of accounts aggregating about \$2,300.)

N. H. HENDERSON."

And appellant testified that all matters referred to in the receipt were accounted for by appellee and settled between them.

Prior to the writing of the letter of October 8, 1887, a conversation was had between the parties which led up to the writing of the letter as a formal notice of cessation of partnership association between them, and if appellee's version of that conversation is true—and in some material essentials it is not denied by appellant—such character is given to the letter, and subsequent settlement of the partnership accounts and business by themselves, as would warrant the jury in finding, as by necessary intendment it is to be inferred they did, that there was no breach of contract by appellee, but that it came to end by mutual consent, and thereby appellant waived all claim against appellee for breach of the contract. For the reason that the conversation referred to involved another person we refrain from preserving it. In this aspect of the case it is not necessary to review the action of the trial court upon instructions

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to the jury, or concerning the admission of evidence, affecting, as such rulings do, only the question of the validity of the arbitration proceedings.

The judgment of the Circuit Court is affirmed.

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Anna Lang v. William Metzger.

1. *TRUSTEE—Unlawful Release of Trust Deed—Notice.*—A trustee can not lawfully release a trust deed for the benefit of his wife, unless the debt represented by it has been paid; and the fact of the uncanceled note, not yet matured, being in the possession of the payee, is sufficient to put mortgage creditors upon inquiry as to whether the note has been in fact paid.

2. *SAME—Power to Dispose of Trust Property—Notice.*—A trustee has no power to sell and dispose of trust property for his own use or at his own mere will. One who obtains it from him or through him, with actual or constructive notice of the trust, acquires no title, and it may be recovered, by suitable proceedings, for the benefit of the *cestui que trust*.

3. *NOTICE—What is Sufficient to Put a Purchaser upon Inquiry.*—The fact that an executor applies estate assets in payment of his own debt is of itself a circumstance of suspicion, which ought to put a purchaser upon inquiry as to the propriety of the transaction.

4. *SAME—Provisions of Promissory Notes.*—Where a promissory note can not be read understandingly without seeing upon its face that it is connected with a trust, and is part of a trust fund, it is the duty of a party, before purchasing it, to make inquiry into the right of the trustee to dispose of it, and, failing to do so, he must suffer the consequences.

Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed December 14, 1899.

Statement.—This is a suit to foreclose a mortgage debt of \$3,000 and interest, brought by appellee as mortgage creditor. Appellant filed her cross-bill, setting up that there was another mortgage lien upon the property in question, which was senior and prior to the mortgage debt

sought to be foreclosed; that the other mortgage had been fraudulently released of record; that she is a *cestui que trust* as to such senior mortgage, and praying for relief in that the fraudulent release be canceled and annulled, and that the trust deed by which the senior mortgage debt was evidenced and secured be re-established as a first lien upon the property prior to the lien sought to be enforced by appellee.

The facts in relation to the bill and cross-bill are as follows: One Joseph Raback died testate, and by his will appointed Louis Pregler executor and trustee, with power to invest the funds of the estate and pay interest derived therefrom to the widow of testator during her lifetime. When Pregler was discharged as executor by the Probate Court he was directed by order of that court to hold the funds of the estate as trustee under the will. Accordingly Pregler, as such trustee, loaned fund of the estate, viz., \$4,500, to one Emily Lucand, and took her note for the amount, payable to himself as trustee, and a trust deed, securing same upon the property here under foreclosure. Afterward the trustee, Pregler, obtained, through various mesne conveyances, a transfer of the title from Emily Lucand to Mary Pregler, his wife. Mary Pregler borrowed from appellee the \$3,000, which is the mortgage debt here sought to be foreclosed, and Louis Pregler joined her in executing a trust deed upon the property to secure the payment of the \$3,000. Appellee learned through his attorneys that the \$4,500 mortgage to Louis Pregler, as trustee, was a prior lien, but before the money was advanced by appellee to Mary Pregler he obtained a release of such prior trust deed, the release being executed by Louis Pregler as trustee. At the time of making the release Pregler produced the mortgage note, payable to himself, as trustee, uncanceled and in his possession, and canceled it. The widow of Raback has since deceased. The fund of \$4,500 is, under the terms of the will, in part devised to appellant. As devisee of Raback and *cestui que trust* under the trust created in Pregler, she asserts by her cross-bill that the trust deed securing the \$4,500 was never satisfied by payment of

the amount to the trustee, was fraudulently released of record, and should in equity be re-established of record and declared a first lien as against appellee, who had notice and knowledge of the facts. It does not appear from any evidence that appellee had any further notice or knowledge than such as would result from knowledge that the trust deed of Lucand to Pregler, trustee, was given to secure a note to Pregler, trustee, and that when the release was executed the note had not yet matured and was in the possession of the trustee, the payee, uncanceled.

It appears from the evidence that Pregler, the trustee, has deceased since the transactions in question. It also appears that Mary Pregler and Louis Pregler conveyed the premises in question to one Tanier, and that Tanier executed a trust deed thereon to Louis Pregler, trustee, to secure two notes of \$2,250 each, which trust deed was junior to the trust deed securing the loan of appellee.

The cause was referred to a master in chancery upon original bill of complaint and cross-bill of appellant, and answers to each, and replications. The master reported *inter alia*: That the loan by Emily Lucand to Louis Pregler, secured by trust deed as aforesaid, was out of the moneys in the hands of Louis Pregler, trustee under said will. That nothing has ever been paid to cross-complainant on account of the principal note of Emily Lucand, or on account of interest since August, 1895, and that the evidence does not disclose whether or not anything was paid to Louis Pregler on account of the principal note. That the *cestui que trust* had no knowledge of the release being executed, and was not consulted with reference thereto. That appellee, William Metzger, accepted the loan referred to in the original bill when the same was presented to him for consideration by loan brokers, who closed the loan, attended to examination of title, drawing up papers, and paid out the full amount of the loan, less usual expenses and commissions, to the order of Louis Pregler, he being authorized in writing by his wife to receive said moneys. Some of said money was used to pay off an incumbrance

on said premises, prior to both of the mortgages here involved. That Metzger knew nothing of the parties connected with the Lucand securities; had no knowledge of the will under which Pregler was acting as trustee, or of any of the proceedings in the Probate Court in connection with the trusteeship. That the evidence does not show that Metzger, or any one acting on his behalf, had any knowledge that the Lucand note had not been paid. That the only notice which Metzger can be chargeable with is record notice of the trust deed, and what that notice might lead to, which trust deed showed the Lucand note was payable to Louis Pregler, trustee, and was not due when Pregler released the trust deed. That Pregler had, under said will and order of the Probate Court, broad and general authority to invest the funds at the highest rate, and, in the opinion of the master, had authority to collect the money and re-invest it if he saw an opportunity to re-invest it to a better advantage. That the evidence does not show that the money was not repaid or re-invested. That trustee failed to account to his *cestui que trust*, but that if one dealing with reference to said trust deed was obliged to ascertain Pregler's authority, the investigation would show that Pregler had authority to collect and manage said funds without consulting any one, and that his statement that the note had been paid was all that was necessary to protect one acting on his release.

The master makes no finding as to whether Pregler, the trustee, upon his decease left any estate.

The master recommended that the cross-bill of appellant be dismissed for want of equity, and that the relief prayed by the original bill of complaint be granted. A decree was entered in conformity with this recommendation. From that decree this appeal is prosecuted.

WICKERSHAM & HAYNER, attorneys for appellant.

A trustee, though nominally possessed of the legal title, has no right to release the trust deed without payment of the debt, or authority from the beneficiary; and if he

wrongfully executes a release without such payment or authority it is void in equity, and the deed remains in full force. 26 Am. & Eng. E. of L., 985; Grove v. Robards, 36 Mo. 523; Lakeman v. Robards, 9 Mo. App. 179; DeLaureal v. Kemper, 9 Mo. App. 77; Armstrong v. Robards, 81 Mo. 445; Carpenter v. Bowen, 42 Miss. 28; Weldon v. Tollman, 67 Fed. 986; Insurance Co. v. Eldredge, 102 U. S. 545.

Whatever is sufficient to put a party on inquiry, (that is, whatever has a reasonable certainty as to time, place, circumstances, and persons,) is, in equity, held to be good notice to bind him. 1 Story's Eq. Juris., Sec. 400.

SCANLAN & MASTERS, attorneys for appellee, contended that knowledge of intention by trustee to convert trust funds is necessary in order to bind party dealing with trustee who acts within the scope of his power. Penn. Ins. Co. v. Austin, 42 Pa. St. 257; Bank v. Hyde Park, 101 Ill. 595.

Where a trustee has power to sell and apply the proceeds to a certain use, or to invest and re-invest the funds, the party dealing with him is not bound to see to the application of the funds by the trustee. Bank v. Hyde Park, 101 Ill. 605; Cherry v. Green et al., 115 Ill. 591.

The fund must be identified to be pursued by the *cestui que trust*. School Trustees v. Kirwin, 25 Ill. 73; Nat. Bank v. Goetz, 138 Ill. 127; Wetherell v. O'Brien, 140 Ill. 146; Mutual Acc. Ins. Co. v. Jacobs, 141 Ill. 261.

A mere confidence is not a trust. Steel v. Clark, 77 Ill. 471.

A direction to pay debts, or apply the income to the support of some one, or to pay legacies, relieves a party dealing with a trustee from seeing to the application of the trust money. Cherry v. Green et al., 115 Ill. 591; Perry on Trusts, Sec. 795; Hill on Trustees, page 342.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But one question is presented upon this appeal, viz.: was

the release by Louis Pregler, trustee, of the Emily Lucand trust deed, operative to discharge the lien of such trust deed, and thereby make the trust deed given by Mary Pregler and Louis Pregler to secure appellee's loan, a first lien upon the property? Louis Pregler was, under the terms of the will of Raback, given general power to invest the trust fund from time to time as he might deem best. Hence, if the Lucand note, representing the trust fund, had in fact been paid to Pregler, the trustee, at the time of the release, whether with or without knowledge or consent of the *cestui que trust*, the payment would have been sufficient and no obligation would have rested upon appellee to see to the application of the money thus paid. And this would, we think, be equally true, whether Mrs. Lucand had before the release paid the mortgage debt, or appellee had paid it to the trustee by giving to the trustee moneys advanced by him on the loan. But the difficulty with the case presented is, that there is no evidence that Mrs. Lucand, or any one on her behalf, ever paid the debt. The master finds that "the evidence does not disclose whether or not anything was paid to Louis Pregler on account of the principal note." It is clear from the evidence that the *cestui que trust* has never received any part of it; but it is not disclosed whether it was paid to the trustee or not. It does not appear from the master's report whether any estate equal to the fund of \$4,500 was left by Louis Pregler. Neither can it be determined from the evidence that the moneys advanced by appellee as a loan to Mary Pregler, wife of the trustee and then the owner of the legal title to the land in question, were paid to Louis Pregler as trustee. On the contrary, it does appear that those moneys were paid to Mary Pregler, and that Louis only received a part of them, and that part only under a written authority as agent for his wife, Mary Pregler, and not at all as trustee under the will of Raback. The question is therefore reduced to the following: If the Lucand note was never paid to the trustee, did the unwarranted and hence fraudulent release by Louis Pregler operate to make appellee's loan a first lien

over the trust deed thus wrongfully released? The note secured by the trust deed had not, by its terms, matured when the release was executed. It was not canceled. It was not in the hands of the maker, who would naturally possess it if it had been paid. It was payable to a trustee. These facts, we think, were enough to put appellee upon notice of the conditions which actually obtained and which he could have learned by inquiry of Mrs. Lucand.

We do not think the position of counsel for appellee can be sustained, that because the trustee, under the provisions of his trust, had power to manage and invest the fund as he deemed best, therefore it is immaterial whether the money had been paid to him or not when he released. If the money had in fact been paid to the trustee, then because of his power to control it, it might be immaterial here whether he had applied it properly or not. But the power of control and management carried with it no power to abandon all right to it in violation of the trust.

Nor do we regard the fact that Pregler, the trustee, then said that the note was paid, and then canceled the note, as relieving appellee from the effect of such notice. Appellee must have known that the trustee could not lawfully release the trust deed for the benefit of his wife unless the debt represented by the trust deed had been paid. The fact of the uncanceled note not yet matured and in the possession, not of the maker, but of the payee, was sufficient to put appellee to an inquiry as to whether the note was in fact paid. *Keohane v. Smith*, 97 Ill. 156; *Jummel v. Mann*, 80 Ill. App. 288, and cases therein cited.

The above authorities bear upon the sufficiency of notice to appellee of the conditions which existed in relation to the release of a mortgaged debt not matured. That appellee had notice that the note in question was part of a trust fund, is settled by the form of the note, which was payable to Pregler, trustee. Appellee knew that Pregler, the trustee, was releasing the Lucand mortgage for the benefit of Mary Pregler, his wife. It seems to be well established that the very fact that an executor applies estate assets in

payment of his own debt, is of itself a circumstance of suspicion, which ought to put a purchaser upon inquiry as to the propriety of the transaction. *Hill v. Simpson*, 7 Ves. Jr., 152; *Petrie v. Clark*, 11 Serj. & R. 377; *Walker v. Taylor*, 4 Law Times (N. S.), 845; *Field v. Schiefflin*, 7 John. Ch. 150; *Shaw v. Spencer*, 100 Mass. 382.

In *Field v. Schiefflin*, *supra*, Chancellor Kent said :

"The great difficulty has been to determine how far the purchaser dealt at his peril, when he knew, from the very face of the proceeding, that the executor was applying the assets to his own personal purpose, as the payment of his own debt. The later and better doctrine is, that in such a case, he does buy at his peril," etc.

Here appellee knew that Pregler, as trustee, was releasing a mortgage, part of the trust fund, and not matured, for the sole benefit of Mary Pregler, his wife. We are of opinion that appellee was put to inquiry as to whether the debt secured by such mortgage was paid, and that he could not rely alone in that respect upon the act or statement of the trustee, who, as he knew, was aiding the procurement of an advance for the benefit of Mary Pregler, and not for the benefit of the trust estate.

If the notice to appellee is sufficient, and if the release was executed by Pregler for the benefit of his wife and in violation of his trust, then the rights of appellant, disclosed by her cross-bill, would be apparent.

"No doctrine is better settled than that a trustee has no power to sell and dispose of trust property for his own use and at his own mere will. One who obtains it from him or through him with actual or constructive notice of the trust can acquire no title, and it may be recovered by suitable proceedings for the benefit of the *cestui que trust*." Third Nat'l Bank v. Lange, 51 Md. 138.

In that case there was involved the disposition of a promissory note by a trustee in violation of his trust. It was contended that the purchaser was innocent of knowledge and without notice. The court said further :

"In the case of the present note, it can not be read understandingly without seeing upon its face that it is connected

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with a trust and is part of a trust fund. It was the duty of the bank before purchasing it to have made inquiry into the right of the trustee to dispose of it. But this it wholly failed to do, and, as it turns out he was disposing of the note in fraud of his trust, the bank must suffer the consequences of the risk it assumed."

Upon another trial of this cause it may be more satisfactorily determined whether Mrs. Lucand had ever paid any portion of the debt evidenced by her note to the trustee, and there may also be a finding of fact as to estate left by the trustee, Pregler, at his decease. Upon the evidence as now presented, the decree can not be sustained.

The decree is reversed and the cause is remanded.

Gray's Harbor Commercial Co. v. George B. Weise and Edward J. Weise.

1. CORPORATION OR PARTNERSHIP—*A Question of Fact.*—As to whether a person is dealing with a partnership or a corporation is a question of fact which should be submitted to a jury for its determination.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed November 27, 1899. Rehearing denied.

Statement.—Appellees are sued as co-partners to recover the contract price of a carload of lumber.

On November 15, 1894, the agent of appellant went to the office of George B. Weise & Son, and took a written order for certain lumber, which was afterward shipped, according to the order. The order was written upon a letter-head of "Geo. B. Weise & Son," and was signed by George B. Weise, with the name "Geo. B. Weise & Son."

The signs over the door and upon the premises were George B. Weise & Son. Nothing about them in any way indicated a corporate character to the firm, and nothing

about the signature to the order indicated that it was made by a corporation. This order was sent to the office of the plaintiff at Cosmopolis, Washington, by the Chicago agent, and was there approved, and the carload of lumber was shipped to George B. Weise & Son, Chicago. The car arrived January 3, 1895, and George B. Weise & Son paid the freight upon it.

Shortly after receiving the lumber, the appellees wrote a letter to the agent of appellant complaining of a shortage in the carload of spruce, and that a part of it was not of full thickness. This letter was written on a letter-head, showing the individual names, George B. Weise and E. J. Weise, and the firm name, Geo. B. Weise & Son, and was signed in the same way as the order, viz., Geo. B. Weise & Son.

George B. Weise and Edward J. Weise had for several years prior to August 24, 1894, carried on and conducted business at the same place. On that date there was filed in the office of the recorder of Cook county articles of incorporation of "George B. Weise & Son." The total capital was five hundred shares, amounting to \$50,000, of which George B. Weise owned 498 shares. There was no transfer or bill of sale of the property and business from appellees to the corporation. The business went on the same as before. The same parties participated in it and carried it on. The same stationery was used in the business, and the book-keeper and agents used the same name in transacting the business.

No stationery was used showing officers of a corporation, and the name was signed without anything to indicate that a president, secretary, treasurer or any other officer of a corporation was acting.

The controverted facts are the following:

On behalf of appellant it is claimed that it dealt with the defendants as individuals and partners in the partnership of "Geo. B. Weise & Son," and that it never had any knowledge in any way or manner of a corporation doing business; while on behalf of appellees it is contended that the agent

of appellant was informed that the concern was incorporated.

The agent of appellant testified that upon taking the order he had "talked with Mr. Weise himself and his son both, and they afterward agreed to take a sample car of spruce," etc.

George B. Weise, the senior member of the firm of Geo. B. Weise & Son, testified as to the giving of the order, "I don't think anything was said about the character of our firm." He also testified that after August 14, 1894, the firm of Geo. B. Weise & Son did not transact any further business.

Alexander J. Weise, a clerk of George B. Weise & Son, testified that at the time of the giving of the order, he stated to the agent of appellant that the concern had become incorporated. This was denied by the agent of appellant. It was shown that the formation of the corporation was published in a certain trade journal, and that appellant was a subscriber to the journal.

At the close of the evidence the trial court directed a verdict for appellees, and from judgment upon the verdict this appeal is prosecuted.

FRED H. ATWOOD and FRANK B. PEASE, attorneys for appellant.

HOYNE, O'CONNOR & HOYNE, attorneys for appellees.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

A motion is presented by appellees "to expunge from the bill of exceptions" the exception shown to have been taken by appellant to the giving of the instruction to the jury directing their verdict to be for the defendants, appellees. This motion is supported by affidavits, which go to show that when the bill of exceptions was presented to counsel for appellees such exception was not contained therein. But no showing is made to the effect that it was not a part of the bill of exceptions when the same was

signed and sealed by the trial judge. The contrary does appear. The motion must therefore be denied.

The only question remaining is as to whether the trial court was warranted in peremptorily directing a verdict for the appellees. There was evidence tending to sustain the appellant's cause of action. The only defense was that a corporation, and not appellees, had dealt with appellant. But the written order given to appellant was not in the corporate name, and it was in the name of a co-partnership which had existed and done business prior to the formation of the corporation. There was no inherent impossibility in the contention of appellant that this firm still continued to do business after the formation of the corporation. The record shows that the firm name and style under which appellees transacted business as a co-partnership was "Geo. B. Weise & Son," and that the corporation was "George B. Weise & Son." If the testimony of the agent of appellant is credited, George B. Weise and his son, as individuals, entered into the contract sued on. The letter heads used in the order and in the subsequent correspondence corroborate this testimony. If the testimony of one of the witnesses called by appellees is credited, the agent dealt with a corporation. Here was an issue of fact which should have been submitted to the jury. If a verdict had been returned for appellant, we are not prepared to hold that it would not have been sustained by the evidence, nor that it would have been manifestly against the weight of the evidence. Hence the trial court erred in peremptorily directing a verdict.

The judgment must therefore be reversed and the cause remanded.

John Reid v. Thomas O'Brien.

1. **COUNTY COURTS—Power to Enter Satisfaction of Judgments.**—The County Court, having entered a judgment, has power upon a motion properly sustained by affidavits tending to show payment of such judgment, to enter satisfaction thereof of record.

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Reid v. O'Brien.

2. **COURTS—Power Over Judgments.**—Where a judgment is in fact paid, the court, on motion, may stay further proceedings, and compel the entry of satisfaction of record.

3. **AUDITA QUERELA—Original Purpose of the Writ.**—The original purpose of the writ, *audita querela*, was to relieve a party from the wrongful acts of his adversary and permit him to show any matter of discharge which may have occurred since the rendition of the judgment.

4. **SAME—Nature of the Writ.**—The writ of *audita querela* was a regular suit with its usual incidents, pleadings, issues of law and fact, trial, judgment and error.

Motion to Enter Satisfaction.—Appeal from the County Court of Cook County; the Hon. R. W. S. WHEATLEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 19, 1899.

DEFREES, BRACE & RITTER, attorneys for appellant.

At common law the writ of *audita querela* was used for the purpose of showing matter in discharge, which occurred after the rendition of the judgment, and wherever that writ would lie at common law, relief may now be obtained on motion. Freeman on Judgments, Sec. 95; Black on Judgments, Sec. 299.

Where a judgment has been paid, the defendant is entitled to have an entry of satisfaction by motion in the nature of a writ of *audita querela*, and that, failing to avail himself of this remedy, he is barred from having relief in a court of equity. *Harding v. Hawkins*, 141 Ill. 572.

PINNEY & ORR, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The only question presented by this record is whether the County Court, having entered a judgment, has power, upon a motion properly sustained by affidavits tending to show payment of such judgment, to enter satisfaction thereof of record.

It appears that appellee recovered judgment in the County Court against appellant. Subsequently the latter appeared and upon proper notice to appellee, moved the court to sat-

isfy such judgment of record; and in support of such motion filed his affidavit, showing *inter alia* that after the judgment in question had been entered against him, he was served as garnishee in an attachment suit of a third party against appellee; that he appeared in said suit, answered that he was indebted to appellee in the amount of such judgment, and that thereupon such proceedings were had that judgment was rendered against him as garnishee of said appellee for the full amount of the judgment which appellee had recovered in the County Court; that he has paid said judgment so rendered against him as garnishee, and that he had no notice of any assignment of the judgment against him in the County Court at the time of such payment. Appellant also offered in support of his said motion for satisfaction of record of such judgment in the County Court, the transcript of proceedings and judgment in the attachment case. The County Court overruled the motion, holding as a matter of law that it had no power to entertain the same, and that appellant's remedy, if any, must be obtained by bill in equity.

We know of no reason, upon principle, why the court can not, upon motion, grant the relief sought, and satisfy its own judgment of record, when convinced by satisfactory evidence that it has been in fact paid. In *Russell v. Huginin*, 1 Scammon, 561, a motion was made by a judgment debtor to set aside an alias execution and a sale made thereunder, and to compel the plaintiff in the original action to enter satisfaction of record on the ground that the judgment had been fully paid and satisfied. Evidence was taken which established payment of the full amount of the judgment before the issue of the alias writ of *feri facias*. It was held that the trial court ought to have set aside the writ, the sale and all proceedings thereunder, and that satisfaction of record should be entered, and the judgment of the trial court overruling the motion and dismissing the same was reversed.

In *Harding v. Hawkins*, 141 Ill. 572-584, it is said :

"In this State, where a judgment is in fact paid, the

court, on motion, may stay further proceedings and compel the entry of satisfaction of record."

It is also said in that case that in cases arising upon motion the same mode of trial ought to prevail as at common law under the writ of *audita querela*; that an issue should be made and sent to a jury to be tried as any other issue of fact.

The original purpose of this writ *audita querela* is said to have been relieving a party from the wrongful acts of his adversary and permitting him to show any matter of discharge which may have occurred since the rendition of the judgment; and as a general rule wherever *audita querela* would lie at common law, relief may now be obtained on motion upon notice. Freeman on Judgments, Sec. 95.

"It is a regular suit with its usual incidents, pleadings, issues of law and fact, trial judgment and error." Black on Judgments, Sec. 299.

It is contended that the defense of payment of the judgment could only be availed of in a court of equity, and a sentence in the opinion of the court in *Allen v. Watt*, 79 Ill. 284, is relied upon to sustain this contention. In that case a judgment had been rendered against appellants, and subsequently there had been a recovery against the judgment debtors as garnishees in an attachment proceeding, and they had paid the judgment so recovered. A writ of *fiery facias* was subsequently issued on the original judgment and the judgment debtors filed a bill for an injunction to restrain the execution of the judgment. It was held that they were entitled to the relief sought. The sentence of the opinion relied upon by appellee's counsel is, "No other remedy could be pursued than by injunction to stay the execution of the judgment." Conceding that this was not *obiter dicta*, as it may doubtless be regarded, we do not regard it as applicable here, where the relief sought is not a stay of execution, but a satisfaction on the record of the judgment claimed to have been paid.

Whether the attachment proceedings against appellee in which appellant was garnisheed, were regular or not, or

whether the judgment has been in fact paid by appellant, are questions which are not before us on this record.

The County Court has power to grant the relief sought by the motion to enter of record satisfaction of the judgment if the same has been paid, and for the error in refusing to entertain said motion, the judgment is reversed and the cause remanded.

Edward H. Heuschkel et al. v. Agnes Heuschkel.

1. **FREEHOLD—When Not Involved.**—Where the issues in a case do not question the right of a widow to claim her dower, but relate only to the court's action in refusing to sustain a plea in abatement, a freehold is not involved.

2. **FORMER SUIT—Plea of, in Abatement.**—A bill by the heirs of a deceased testator against the widow in her own right and as executrix, praying that her dower be assigned, that partition be made of the real estate, an accounting be taken of the rents, profits and income of the real estate, that the will be construed, and that the bequests and legacies be set apart in accordance with its terms, can not be pleaded in abatement to a bill subsequently filed by the widow praying that her dower in the real estate left by the testator be assigned and set off to her according to the statute, and that she be awarded damages suffered by its having been so far withheld.

3. **DOWER—Assignment of, Not to be Indefinitely Delayed.**—The right to assignment of dower is conferred by the statute, and can not be indefinitely delayed to await the process of another suit under control of adverse interests, involving matters of an entirely different nature, and in which the assignment of dower is only incidentally prayed.

Bill for Dower, etc.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 19, 1899.

Statement.—One Frank Heuschkel died testate in November, 1895, seized of real estate. The will having been duly admitted to probate, and letters testamentary issued in accordance with its provisions, appellee, who is the widow of said testator, filed in the Probate Court within the year,

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her renunciation under the will, and elected to take under the statute. She caused notice of such renunciation and a demand in writing that her dower be set off to her, to be served upon the heirs at law. December 3, 1896, within a month after such renunciation, the heirs at law filed a bill in the Circuit Court against her as widow and as executrix—joining certain other parties whose rights are not involved in this appeal—praying that the dower of appellee be assigned, that partition be made of the real estate, that an accounting be taken of the rents, profits and income of the real estate, that the will be construed, and that the bequests and legacies be set apart in accordance with its terms.

To this bill appellee first filed a general demurrer. Subsequently a demurrer to so much of said bill as prayed for relief other than assignment of appellee's dower was filed; and also an answer admitting that the prayer for such assignment of dower should be granted, and asking that dower be set off to her in accordance with the provisions of the statute.

January 4, 1898, more than a year thereafter, appellee herself filed a bill, also in the Circuit Court, praying that her dower in the real estate left by the testator be assigned and set off to her according to the statute, and that she be awarded damages suffered by its having been so far withheld.

To this bill certain of the defendants therein filed a plea in abatement, and set up the pendency of the former suit begun December 3, 1896. The plea alleges that the bill of complaint in that case was exhibited "for the purpose of assigning and setting off to the above named Agnes Heuschkel as widow of Frank Heuschkel, deceased, her dower in all of the premises described in complainant's present bill, and to have said premises partitioned and divided among the heirs of Frank Heuschkel, deceased, and for certain other relief in the premises, and such further relief as equity might require and as should to this honorable court seem just and proper, and praying particularly that the dower of

said Agnes Heuschkel may be assigned and set off to her out of the above described real estate, to the same effect as the complainant now prays by her said present bill, and said complainant, Agnes Heuschkel, appeared as defendant in that suit, and demurred to so much of said bill except as prayed for the assignment of and allotment of her dower, and answered the remainder of said former bill, and that said former bill, and the several proceedings in the said former suit, now remain pending and undisposed of, and of record in this honorable court, the said cause being yet undetermined and undismissed; wherefore these defendants pray that the said bill of complaint herein, filed by Agnes Heuschkel, complainant, may be dismissed and her suit abated," etc.

To this plea complainant filed her replication. The cause was referred in due course to the master, who reported that in the former suit, "all of the relief prayed for by complainants, and which they themselves may obtain ultimately, is not in any way included or involved or covered by the bill of complaint in this cause."

A decree was entered finding appellee entitled to dower in accordance with the prayer of her bill, from which appellants prosecute this appeal.

GEORGE HUNT and JAMES R. WARD, attorneys for appellants.

LOESCH BROTHERS & HOWELL, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Counsel for appellee have filed a motion for the dismissal of the appeal, upon the ground that a freehold is involved, and therefore this court has no jurisdiction. The issues in this case, however, do not raise any question of appellee's right to dower in the real estate described in the bill. The errors assigned relate to the court's action in refusing to sustain the plea in abatement. To this plea replication was filed, and thus its truthfulness was put at issue. This was the only issue involved. But the plea does not question

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complainant's right to the dower she claims. It disputes only her right to maintain this suit, upon the ground that a former suit instituted for the same purpose and relief, is still pending and undisposed of. The right of appellee to the dower claimed is not put in issue at all. A decision of the only question before us upon this appeal does not determine any question relating to complainant's right to a freehold interest in the land described in her bill of complaint. It determines only the question of her right to maintain this suit. The question of a freehold not being involved, the appeal is properly taken to this court. *Van Meter v. Thomas*, 153 Ill. 65-69; *Rhodes v. Rhodes*, 172 Ill. 187-191.

It is urged by counsel for appellee that the plea of abatement was properly overruled upon the merits. The master found that although the fact of difference in parties to the two suits is immaterial, there is substantial difference in the relief sought. In this we concur. In the former suit the complainants therein seek relief for themselves. While the bill in that case does incidentally ask that appellee's dower be assigned to her, the scope and purpose of the bill are to obtain relief in other and very different respects. The latter suit has for its purpose to procure the assignment of the dower to which, under the statute, appellee is entitled. The plea does not aver either directly nor by implication from the facts as therein stated, that the second suit is for the same subject-matter as the first. Neither does it aver that the proceedings in the former suit were taken for the same purpose as the latter. It is evident from the plea itself that they were not so taken. *Story's Equity Pl.*, Sec. 737-739; 1 *Daniell's Chancery Practice* (6th Ed.), 636.

The right to assignment of dower is conferred by the statute, and it would be inequitable to hold that this could be indefinitely delayed to await the slow progress of another suit under control of adverse interests, involving matters of an entirely different nature, and in which the assignment of dower was only incidentally prayed.

Finding no error in the decree of the Circuit Court it must be affirmed.

Rice & Bullen Malting Co. v. International Bank.

1. *AGENCY—Its Existence—How Established.*—The existence of an agency may be established by the oral testimony of an employe of the principal, having knowledge of the fact.

2. *SAME—Liability of a Purchaser After Notice.*—Where a person purchases property in the possession of an agent, but before paying for the same is notified that the person of whom he is buying is only an agent, he will be liable to the principal for the same.

3. *SAME—Payment by a Purchaser of Goods from an Agent.*—It is immaterial to a purchaser of goods from an agent to whom he makes payment, and he can not be prejudiced when he has not contracted with reference to claims against the agent, and pays to one not the real owner, after he has been notified that the real owner makes a claim to the purchase price agreed to be paid by such purchaser.

4. *INSTRUCTIONS—Invading the Province of the Jury.*—It is not error to refuse an instruction which tells the jury what weight it should give to certain evidence bearing on a question of fact in issue.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant, contended that conversations between a principal and agent not brought to the knowledge or attention of a party to a suit are incompetent, and it is error to permit them to be proven. *Adams Express Co. v. Boskowitz et al.*, 107 Ill. 660; *Cottom v. Holliday*, 59 Ill. 176; *Boeker v. Hess*, 34 Ill. App. 332.

Where a person intrusted with goods as an agent sells them to one who has no knowledge that he is agent, but is led to believe from the manner that he has been allowed to deal with the goods that they are his, the principal is bound by the contract made and by the equities of the purchaser. *Mechem on Agency*, Secs. 279, 283, 284, 362 and 709; *Story on Agency*, Secs. 390 and 444; *Am. & Eng. Ency. of Law*, Vol. 1, p. 410, and Note 2; *Koch v. Willi*, 63 Ill. 144; *Connelly v. McConnell*, 39 At. Rep. 773; *Locke v. Lewis*, 124 Mass. 7; *Traub v. Milliken*, 2 Am. Rep. 14; *Kelly v. Munson*, 7 Mass. 319.

MORAN, KRAUS & MAYER, attorneys for appellee.

The authority of an agent where the question of its existence is directly involved, can only be established by tracing it to its source in some word or act of the alleged principal. Even where the agent enters into a written contract, it is competent for the principal to show by parol evidence that the agent was acting for him. *Barker v. Garvey*, 83 Ill. 184.

It has been uniformly held that proof of the authority of the agent can be shown either by the principal or the agent. *Mechem on Agency*, Ed. of 1889, Sec. 100; *Barker v. Garvey*, 83 Ill. 184; *Ohio & Miss. Ry. v. Middleton*, 20 Ill. 637; *C. B. & Q. v. Willard*, 68 Ill. App. 315; *Snow v. Warner*, 51 Mass. 136; *Am. & Eng. Ency. of Law*, 2d Ed., Vol. 1, p. 970, and cases cited; *Lunsford v. Smith*, 12 Gratt. 554.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee sued appellant in assumpsit to recover the value of certain malt claimed to have been sold by appellee's agent, one Pank, on May 4, 1894, and recovered a judgment for \$3,646.67, from which this appeal is taken. No question is made as to the amount of the judgment, but appellant contends that it was not liable in any event.

The declaration was the common counts, to which appellant pleaded the general issue. The jury found generally for the appellee and assessed the damages for the amount for which the judgment was rendered, and also made certain special findings as follows:

"At the time of the making of the contract for the sale of the malt by J. H. Pank and the defendant, was anything said about malt of the International Bank, or belonging to the International Bank?" "No."

"At the time of the delivery of the National Storage Company's receipt, numbered 3572, in evidence, to J. H. Pank, did the plaintiff, the International Bank, know that said Pank had made a bargain for the sale of malt to the defendant company?" "Yes."

"At the time of the delivery of the National Storage Company's receipt, numbered 3572, in evidence, to J. H. Pank, was such delivery made for the purpose of having

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said Pank deliver the malt called for by said receipt to the Rice and Bullen Company, pursuant to a contract which Pank had theretofore made with the defendant company for the sale to it of 25,000 bushels of malt at fifty-one cents per bushel?" "Yes."

"Did not the defendant company agree with J. H. Pank to purchase of and from said Pank about 25,000 bushels of malt at fifty-one cents per bushel, to be delivered F. O. B. cars by said Pank, and to make payment for said malt to the Fort Dearborn National Bank?" "Disagree."

"If you say that the defendant company did agree with J. H. Pank to purchase of and from said Pank about 25,000 bushels of malt at fifty-one cents per bushel, to be delivered F. O. B. cars by said Pank, and to make payment for said malt to the Fort Dearborn National Bank, was not the malt in controversy delivered under such contract before the defendant had any knowledge of any interest in or claim thereto by the plaintiff?" "Disagree."

The evidence shows that on June 9, 1893, Pank & Co. were doing business as malsters in Chicago, and in the course of such business received from the National Storage Company, which was doing business as warehousemen, a warehouse receipt, dated June 9, 1893, for 6,000 bushels of malt in bin No. 1 at the warehouse of said storage company, which malt, by the terms of said receipt, was to be delivered to Pank & Co. upon the payment of storage and charges and the surrender of the receipt properly indorsed. This receipt, with two others, each for 6,000 bushels of malt, was pledged to secure two notes of Pank & Co., one dated October 21, 1893, for \$7,800, and one dated November 1, 1893, for \$4,000, and both payable to Wakem & Marshall. Appellee purchased both said notes in good faith for value, and received the notes, together with the said warehouse receipts, during February, 1894, and in connection therewith received certain collateral security. This suit is to recover for the contract price of the malt mentioned in the first receipt which was delivered by the appellee to J. H. Pank, a member of the firm of said Pank & Co., as appellee's agent, to sell the same to appellant. Prior to the delivery of the receipt to Pank, Pank & Co. had made an assignment for the benefit of their creditors to one Moeller

as assignee. Moeller, on May 4, 1894, requested, in writing, appellee to deliver to Pank the receipt in question "for delivery on sale to" appellant, and stated in the writing that he would hold himself responsible to appellee for the amount due it. This request was made at the suggestion of Lowenthal, assistant cashier of appellee, and was delivered by Pank to appellee at the time he received the warehouse receipt.

Pank & Co. had also borrowed money of the Union National Bank, and were also indebted to the Fort Dearborn National Bank, to secure which indebtedness they had pledged other like warehouse receipts of the National Storage Company to them of certain malt, which receipts showed that the malt therein mentioned was stored in other bins in the warehouse of the storage company.

Pank sold the malt here in question to appellant on April 26, 1894, and also some 19,000 bushels more which was mentioned in the warehouse receipts held by the Fort Dearborn and the Union National Banks. There is some conflict in the evidence as to whether appellant knew at the time that the malt was received by it, as to whether the malt here in question belonged to appellee or to the Fort Dearborn Bank; but the evidence is clear that appellant knew, before it claimed to have paid to the Fort Dearborn Bank for the malt in question, that appellee claimed to be the owner of it and entitled to receive the proceeds thereof.

Appellant contends, and there is evidence to support the contention, though there is evidence to the contrary, that it purchased the malt here in question from Pank upon the understanding on its part that the purchase price thereof was to be paid to the Fort Dearborn Bank.

It is also claimed by appellant that appellee, by the delivery of the warehouse receipt in question, lost its lien on, or property in the malt; and in that connection it is further claimed that the National Storage Company did not in fact at the time in question have possession of the malt, but that the storage company permitted such possession to be in Pank & Co. and their employes. This latter

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contention is not sustained by the evidence, which shows clearly that up to the very time the malt was taken to be delivered to appellant it was in the exclusive possession of the storage company.

Appellee was, over the objection of appellant, allowed to show the agency of Pank for appellee to sell the malt, by oral evidence of the witness Lowenthal, assistant cashier of appellee, as to instructions given by him to Pank at the time the receipt was delivered to the latter.

On cross-examination of the same witness it appeared that appellee had received other warehouse receipts as collateral to its claim than the one here in question, and was asked what had become of them, to which objection that it was not cross-examination was interposed, and the court sustained the objection. The witness was, however, recalled before the close of plaintiff's case and was fully cross-examined as to the amount due appellee.

Numerous objections are made as to the instructions given for appellee, those on behalf of appellant refused, and also as to the modification of certain instructions asked by appellant, which will be referred to hereafter.

We are of opinion that the evidence as to the agency of Pank was entirely proper. Indeed, we can not well see how it could have been established in any other way. The fact that no one representing appellant was present at the time Pank received his instructions as to the sale of the malt, can make no difference as to the competency of the evidence. *Mechem on Agency*, Secs. 81, 100, 106; *Barker v. Garvey*, 83 Ill. 184; *R. R. Co. v. Willard*, 68 Ill. App. 315.

Any error of the court, if it was error, in refusing to allow the witness Lowenthal to state what had become of the other warehouse receipts besides the one here in question, was cured by the subsequent cross-examination of the same witness. The only possible materiality of the evidence would have been to show that appellee had realized upon such collateral sufficient to pay appellee's claim. This was fully covered by the further cross-examination of

the witness, in which he stated that there was something due upon the note. This was sufficient to allow a recovery for appellee. It was immaterial to appellant how much was due. *Tooke v. Newman*, 75 Ill. 215.

Certain instructions were given for appellee to the effect, in substance, that if the evidence showed that the bank sold the malt through its agent, Pank, to appellee, and that the malt belonged to appellee, of which appellant was notified before it paid the Fort Dearborn Bank, and that appellant had not paid appellee therefor, then the verdict should be for appellee. Especial complaint is made of the sixth instruction given for appellee, which is in substance as above stated, except that the time of notice to appellant is not fixed. This, it is argued, tells the jury that the appellant is liable without any reference to when it received notice that appellee claimed to own the malt in question, and would justify the jury in finding there was liability to appellee, even though the appellant was first notified of appellee's claim to the malt after it had paid the Fort Dearborn Bank for it. Appellant also contends that the instruction is in direct conflict with instructions 5b and 7, given on behalf of appellant, as modified by the court, the former of which tells the jury, in substance, that if they believe, from the evidence, that appellee held the warehouse receipt in question on May 4, 1894, and on that day surrendered it to Pank, and in consideration thereof received the written request of Moeller, assignee, of that date, then that appellee lost all lien it had by virtue of the receipt upon the malt as against appellant; and further, if the jury should believe, from the evidence, that said malt was sold and delivered by Pank to appellant without any agreement on its part to pay appellee therefor, and without any knowledge on the part of appellant of any claim by appellee to the malt, at the time appellant received or paid for the same, then the jury should find for the appellant; and the latter of which said instructions is in substance to the effect that if appellant bought the malt in question from Pank & Co. and agreed to pay for the same to the Fort

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Dearborn Bank, that the malt was delivered to appellant by Pank & Co. or J. H. Pank pursuant only to such agreement, then the jury should find for appellant, provided they also believed that appellee surrendered its warehouse receipt to Pank or Pank & Co. prior to the delivery of the malt to appellant, and provided further, that appellant did not know or was not notified of appellee's claim to the malt. Instruction 6 for appellee is certainly in conflict with the two instructions for appellant above referred to as to the matter of the time when appellant received notice of appellee's claim to the malt, and would be cause for reversal but for the fact that the instructions on behalf of the appellant are as favorable to it in that respect as could be asked under the law, and for the further fact that there is no conflict in the evidence, but that appellant knew of appellee's claim to the malt in question before it claimed to have paid for the same to the Fort Dearborn Bank. In fact, appellant concedes that it knew of appellee's claim before such alleged payment.

We are of the opinion that there can be no question that the law is, the case of *Boston Ice Co. v. Potter*, 123 Mass. 28, to the contrary notwithstanding, that where a person deals with an agent who is clothed with the possession of property, and before payment for such property is made by the person purchasing the same, the purchaser is notified that the person with whom he dealt was only an agent, the purchaser will be liable to the principal, whoever he may be. *Kelley v. Munson*, 7 Mass. 319; *Traub v. Milliken*, 2 Am. Rep. 14 (57 Me. 63); *Mudge v. Oliver*, 1 Allen, 74.

It is immaterial to a purchaser of goods from an agent to whom he makes payment, and he can not be said to be prejudiced when he has not contracted with reference to a claim he has against the agent, and pays to one not the real owner, after he has been notified that the real owner makes a claim to the purchase price agreed to be paid by such purchaser. In the case at bar appellant had no equities as against Pank or Pank & Co. According to its claim it merely desired that the Fort Dearborn Bank should collect its debt.

None of the special interrogatories answered by the jury relate to ultimate facts in the case inconsistent with the general verdict, and no question is raised by appellant as to the interrogatories which the jury failed to answer.

It is claimed that the court erred in refusing to give, as asked, appellant's instructions 5b and 7, and in modifying them and giving them as modified. We have above stated the substance of these instructions as modified and given by the court. Instruction 5b, as asked, was clearly erroneous, in that it told the jury, in substance, that the appellant was not liable for the malt if it did not know of appellee's claim thereto at the time it was received by appellant. The 7th instruction, as asked, was clearly erroneous, in that it told the jury, in substance, that the appellant was not liable for the malt, although it knew, prior to its delivery to appellant, of appellee's claim thereto.

The further claim is made that the court erred in refusing to give appellant's 3d, 4th, 6th and 12th instructions. They need not be set out. It seems sufficient to say that the 3d instruction substantially tells the jury what weight it should give to certain evidence bearing on a question of fact in issue. The 4th instruction simply states an abstract proposition of law without making any application of it to the case at bar. The 6th instruction for appellant omits the matter of Pank's agency for appellee and all question of notice to appellant of appellee's claim to the malt before payment therefor to the Fort Dearborn Bank. The 12th instruction is subject to the same faults as the 6th.

Appellant also makes claim that the warehouse receipt in question was void and did not constitute *indicia* of ownership, and refer to the case of Union Trust Co. v. Trumbull, 146 Ill. 73. An examination of this case shows that it is not applicable to the case at bar. Moreover, even if it be admitted that the warehouse receipt was invalid, appellee obtained possession of the malt covered by the receipt, and there is no question in this case as to the rights of creditors or innocent purchasers. See also as to the validity of the receipt in question and its effect as a muniment of title

Northrup v. First Nat. Bank, 27 Ill. App. 527, and cases there cited; M. & C. R. R. Co. v. Phillips, 60 Ill. 198; and Montgomery Ward & Co. v. Am. T. & S. Bk., 71 Ill. App. 20, 29, and cases cited.

Other contentions are made by appellant's counsel, which we deem it unnecessary to refer to specifically; suffice it to say they have all been considered, and in our opinion are not tenable.

The judgment of the Superior Court is affirmed.

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William J. Ross and John Ross v. Francis Shanley.

1. **MASTER AND SERVANT**—*Master Must Provide a Reasonably Safe Place for the Servant.*—It is the duty of the master, or the foreman who represents him, to see that the place where he orders the servant to work is reasonably safe.

2. **SAME**—*Servant Has a Right to Rely upon the Performance of the Master's Duty.*—A servant has the right to rely upon the performance of the duty of the master to provide a reasonably safe place for his work, and is not required to make a critical and careful examination of his surroundings.

3. **ORDINARY CARE**—*A Question for the Jury.*—It is a question for the jury to determine whether a master's foreman has exercised reasonable and ordinary care to see that the place where he orders the servant to work is reasonably safe before he sends him there to work, and also whether the servant knows or should know the danger to which he is exposed.

4. **PRACTICE**—*Variance Between the Declaration and Proof.*—Where a plaintiff amends his declaration he avoids all question of variance if the defendant's evidence supports the amended declaration.

5. **TORT FEASORS**—*Joint Feasors Severally Liable.*—In an action for a tort the plaintiff may sue any one or more of the joint tort feasors and may have a judgment against any one or any number of the persons so sued, who are shown to be guilty of the tort alleged.

Action in Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899. Rehearing denied.

Statement by the Court.—Appellee, a brick-layer and experienced tunnel-worker, while in the employ of appel-

lants, who are copartners in business as Ross & Ross, was injured in his back and had one leg broken at the ankle, a compound fracture, while working in a tunnel being constructed by appellants for the city of Chicago, on the 10th day of April, 1896. He brought suit against the city of Chicago, and also against John McRae and appellants as partners under the name of Ross, McRae & Ross. At the close of all the evidence the suit was dismissed as to the city, and during the argument to the jury there was also a dismissal as to McRae and an amended declaration filed at that time. There was a judgment for \$2,000 in appellee's favor against appellants, from which this appeal is taken.

The original declaration, in its first count charges the defendants with negligence in failing to furnish to plaintiff a safe place in which to work; that they carelessly and negligently set plaintiff to work in a place in the tunnel where the clay composing the ceiling thereof was not properly propped up, and where no other careful or prudent method was adopted by defendants to prevent the ceiling of the tunnel from falling down on plaintiff while engaged at work; that said place was dangerous and unsafe for plaintiff to work in and around, which facts were well known to defendants and each of them, and unknown to plaintiff, and that he could not, in the exercise of ordinary care on his part, have ascertained said facts.

In the second count the negligence charged is in failing to warn plaintiff of the hidden, unusual and unforeseen hazards and dangers in and about said work, and makes practically the same allegations as in the first count with regard to the condition of the ceiling of the tunnel and as to the knowledge thereof of the defendants and plaintiff respectively. To this declaration all of the defendants pleaded the general issue, and when the amended declaration was filed, during the argument and after the dismissal as to the city and McRae, the remaining defendants, the appellants here, pleaded the general issue and the statute of limitations to the amended declaration. A demurrer to the plea of the statute of limitations was sustained. The amended decla-

ration is in substance the same as the original, except that wherever the name of McRae and the city of Chicago in the original declaration appear, they are omitted in the amended declaration. At the close of the plaintiff's case, and also at the close of all the evidence, the defendants asked the court to instruct the jury to find them not guilty, which was refused.

When the amended declaration was filed, appellants' counsel also asked a dismissal of the cause for the reason, as he claimed, there was a variance between the proof and the amended declaration, the proof being that Ross, McRae & Ross employed appellee, whereas the declaration alleged that the firm doing the work was Ross & Ross, which was denied.

It appears from the evidence that appellee went to work in the tunnel in question on Monday evening, previous to the accident, which happened on Friday morning about two o'clock, and had worked in the tunnel the intervening nights of Tuesday and Wednesday; that Drury, the regular foreman of the brick-layers' gang of which appellee was a member, was not present on the first night, but that the foreman who took his place ordered appellee to work at the face of the tunnel; that he did so, and that on the night before the accident Drury told appellee to work at the face of the tunnel, stationed him there, and that was his place, and he continued to work there until the time of his injury. Appellee testified that on the night of the injury Drury did not say anything to him, but other of appellee's witnesses said that they heard Drury tell appellee to go to work at the face of the tunnel.

The evidence also shows that the tunnel was about ten feet in diameter before the brick was laid, and after the brick was laid, that it was about seven feet; that three gangs of men were engaged at working on the tunnel, two being miners and one gang brick-layers, each working eight hours; the miners blasted the earth loose, removed it in cars, trimmed up the sides, and end or face of the tunnel, as it is called, practically smooth, and then shored it up for

the brick-layers; that the shoring was done by placing crutches or heavy timbers opposite each other, which met in the center of the arch or ceiling of the tunnel, the ends being stuck in the sides of the tunnel and wedged in; that on top of the crutches in the center there was placed a plank about a foot wide, about two inches thick, and from twelve to fourteen feet long, called the crown plank, and on either side of the crown plank, another similar plank on the crutches, and next to the clay; that this was the common method in use in and about Chicago; that the miners would remove about twenty-seven to thirty feet of the dirt in length of the tunnel, and shore it up before the brick-layers commenced, this being called a shift; that the shoring commenced on each shift where the previous shift stopped, and the planks extended toward the face of the tunnel, but as to how near to the face of the tunnel they usually extended, there is a conflict; that there were usually two to three sets of crutches to a shift; that on the night of the injury the work of the miners was inspected by the city mining inspector, who testified that its condition was all right; that Drury, the brick-layers' foreman, also looked at the miners' work before the brick-layers went to work, and testified that it looked the same as it usually looked, and that it was good work; that he could not see it very well because of the imperfect light, but that the tunnel was lighted as usual; that a quantity of clay, variously estimated by the witnesses at from 150 to 600 pounds in weight, fell upon appellee from the ceiling above, while he was engaged at laying brick near the face of the tunnel; that the rate of wages of brick-layers on outside work was at the time of the accident four dollars per day, and that appellee received for his work on this job six dollars per day because of the dangerous and hard work required; that appellee and two other brick-layers were expected to lay 13,000 bricks in about seven hours. Appellee testified that he worked "as hard and fast as ever he could" while at his work.

There is a conflict in the evidence as to the usual manner of shoring up a tunnel such as the one in question, some of

the witnesses testifying that the usual way was to shore it up right to the face, and others that it was usually shored up to within two to three feet of the face, according to the character of soil.

Butler, the city mining inspector, testified that in the character of ground in this tunnel it was not considered necessary to run the planking to the face. There was evidence that the soil in this tunnel had some sand in it; that it was mixed clay and sand. There was also evidence that it was clay, and that was the testimony of appellee himself, except that he said there was sand in the scales in the joints between the flakes of clay that fell upon him; that it was "what we call sand and clay formation."

There is also a conflict in the evidence as to how the shoring was done at the time of the accident, some of the witnesses saying that the shoring extended to within about two feet of the face of the tunnel, and others that it was not nearer than four, five, or even six feet from the face.

There was a further conflict as to the usual method of placing the crutches to support the planks, and also as to how they were supported at the time of the accident, some of the witnesses saying that the crutch nearest the face of the tunnel was within six inches of the end of the planks, and others that it was from three to five feet back from the end of the planks and from seven to nine feet from the face of the tunnel. Butler, the city inspector, testified that from the face of the tunnel to the east crutch (the one nearest the face) was about six feet, and that there was nothing between it and the end of the plank, which he said was two feet from the face of the tunnel, to support the plank except its stiffness, and that that was the condition when appellee was hurt.

The clay which injured appellee came from a point mostly between the end of the planks and the face of the tunnel, but several of the witnesses testified that some of the dirt came from above the plank, and that the end of the plank was sprung down.

It also appears that on the first night that appellee went to work, he examined the shoring and saw that the ends of

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the plank were then about two feet from the face of the tunnel; that he did not on the night of the injury examine the shoring critically. He testifies, however, that the ends of the planks were about four feet from the face of the tunnel at the time he was hurt.

It further appears from the plaintiff's evidence that appellee was employed by and worked for the firm of Ross, McRae & Ross, but the evidence on behalf of the defendants shows that appellee was employed and paid by and worked for the firm of Ross & Ross.

WM. M. JOHNSON, attorney for appellants.

JOHN F. WATERS, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellants' counsel, in his brief, makes twenty-one different points on account of which he claims that the judgment should be reversed. We think they may be all summarized under four different headings, viz: First, that the negligence charged was not proven; second, that the hazard was assumed by appellee; third, that there was a variance between the proof and the allegations of the amended declaration; and fourth, that the court erred in sustaining the demurrer to the plea of the statute of limitations to the amended declaration.

As we have seen, there is a conflict in the evidence as to the usual manner of shoring the tunnel in which appellee was placed to work, in order to make it safe, and there was also a conflict as to the manner of the shoring, both as to the placing of the crutches and the nearness to which the planks used in shoring came to the face of the tunnel; and we are not prepared to hold, after a careful and critical reading of the evidence, that the jury were not justified in finding that the shoring did not extend sufficiently near to the face of the tunnel, and that the crutch nearest the face of the tunnel was not sufficiently near to the end of the planks to make a reasonably safe place in which appellee could

do his work. Appellee was ordered by appellants' foreman to work where he did at the time of the accident. Appellants' foreman, in ordering appellee to work where he did, was charged with the duty of seeing that the place was reasonably safe. He represented appellants, and for them was bound to take reasonable precautions for the safety of appellants' employes. Ill. Steel Co. v. Schymanowski, 162 Ill. 459; Consolidated Coal Co. v. Haenni, 146 Ill. 625; Hess v. Rosenthal, 160 Ill. 628; C. & E. I. R. R. Co. v. Hines, 132 Ill. 169; Cribben v. Callaghan, 156 Ill. 551; Hines L. Co. v. Ligas, 172 Ill. 315; Offutt v. World's Col. Exp., 175 Ill. 472.

But it is said that appellee assumed the risk of any dangers of his work, and being an experienced man in tunnel work, was chargeable with knowledge of any defects in the shoring which existed; that he knew, or could have known by the exercise of ordinary care on his part, any such defects as well as appellants' foreman. This contention is not, in our opinion, tenable. Appellants' foreman was charged with a specific duty, to wit, that of exercising reasonable care to see that the place where he sent appellee to work was reasonably safe, and appellee had a right to rely upon the performance of such duty by appellants' foreman before he gave the order for him to work where he did. Appellee was not required to make a critical and careful examination of his surroundings at the place where he was sent to work by the foreman. We think it was properly left to the jury to determine whether appellants' foreman exercised such reasonable and ordinary care to see that the place where he ordered appellee to work was reasonably safe before he sent him there to work, and also whether appellee knew or should have known the danger to which he was exposed. We can not say the verdict is manifestly against the evidence. Schymanowski case, *supra*; C. & E. I. R. R. Co. v. Hines, 132 Ill. 169; Nat'l Syrup Co. v. Carlson, 155 Ill. 215; Dollemand v. Saalfeldt, 175 Ill. 310; C. & E. I. R. R. Co. v. Knapp, 176 Ill. 127; McGregor v. Reid, 178 Ill. 464.

We think the foregoing considerations sufficiently dispose of the first and second points.

The third contention, that there is a variance between the allegations of the amended declaration and the proof, is not sustained by the record. It is true that the evidence on behalf of appellee shows that he was employed, worked for, and was paid by the firm of Ross, McRae & Ross, and this conformed to the allegation of the original declaration. The evidence offered on behalf of the defendants showed quite conclusively that appellee was employed, paid by and worked for the appellants, Ross & Ross. When this proof was made, and while the case was being argued, appellee filed his amended declaration, the allegations of which conformed to the proof so made by the appellants. By thus amending, appellee avoided all question of variance, for the reason that the appellants' evidence supported the amended declaration in this regard.

As to the fourth contention, that there was error in the ruling of the court in sustaining a demurrer to appellants' plea of the statute of limitations to the amended declaration, we are of opinion it can not be maintained. The amended declaration states the same cause of action as the original declaration, in all respects. The only difference between the two declarations is the omission of the names of the defendants McRae and the city of Chicago from the amended declaration, which names were included in the original declaration and are charged in it as joint tortfeasors with the defendants Ross & Ross. It is elementary and needs the citation of no authorities to establish the proposition that in an action for a tort the plaintiff may sue any one or more of the joint tortfeasors, and may have a judgment against any one or any number of the persons so sued, who are shown to be guilty of the tort alleged. It seems clear, therefore, and beyond all controversy, that the amended declaration in this case did not state a new cause of action different from the original, and that the ruling sustaining the demurrer to the plea of the statute of limitations was correct.

The judgment of the Circuit Court is affirmed.

Chicago Edison Co. v. Mary Moren, Adm'x, etc.

1. NEGLIGENCE—*Insufficient Proof of.*—Evidence which fails to prove what a certain alleged defect was, whether it was patent or latent, or whether by the exercise of ordinary care it could have been detected on inspection, is insufficient as proof of negligence.

2. DAMAGES—*When \$5,000 is Not Excessive.*—Where the deceased left surviving him his widow and four children, the eldest fourteen and the youngest three years of age, the evidence showing that while living he supported his family, \$5,000 is not excessive.

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. GEORGE A. TRUDE, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed November 27, 1899. Petition for rehearing denied.

AMERICUS B. MELVILLE and F. J. CANTY, attorneys for appellant.

JUDD & HAWLEY, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment for \$5,000 recovered by appellee in a suit against appellant and the Merchants' Transfer Company. The facts, in so far as they are necessary to the decision of the appeal, are substantially as follows:

The Chicago Edison Company employed the Merchants' Transfer Company to take down and remove from the plant of the former its boiler and engines. The boiler weighed between 26,070 and 28,000 pounds, was from 18 to 20 feet in length, and rested on a brick foundation about 3½ feet high. By the terms of the contract between the companies, the Merchants' Transfer Company had the exclusive right to determine the manner of removal of the boiler, and the machinery and appliances by which such removal would be effected. The work of removing the brick foundation, so that the boiler might be lowered onto skids preparatory to removal from the building, was the work of appellant, and was exclusively under its control and direction. The Trans-

fer Company sent to appellant's building its foreman, John Brown, with a gang of its men and the necessary appliances to hoist and remove the boiler. When Brown arrived with his men at appellant's building, appellant's foreman, Patrick Tully, was there with a gang of appellant's men, of whom Thomas Moren, appellee's intestate, was one. At that time the brick had been removed from beneath the north end of the boiler and that end was temporarily supported by iron slabs or legs. The south end rested in an arch in the brick foundation. It was hoisted in the usual way and by means of the usual appliances. John Brown, foreman of the Transfer Company, testified:

"The chain we used was a three-fourths inch chain. There were two drums to that boiler. We used two chains, each three-fourths inch. Each chain was wrapped twice round each drum. Overhead they were fastened by a pulley and a hook—fastened by a pulley. The pulley was fastened by the hook. These chains were around different drums and united up there in the hook that was fastened to a beam above. It was one chain, but three times in the hook."

The chain was not only twice around each drum, but came together and hung double in the hook. The chain was iron, capable, as was estimated, of supporting a weight of 29,000 pounds used singly, and twice that weight when used as above described.

Van Court, the treasurer and cashier of the Merchants' Transfer Company, and who had general supervision of the business of that company, was present when Brown, the foreman of the company, was ready to commence hoisting the boiler from the foundation, and seeing some of appellant's men working under the boiler, he spoke to Tully, appellant's foreman, telling him that he had better take his men from under the boiler until it should be hoisted and blocked up. The men then came from under the boiler. After so cautioning Tully, Van Court went to lunch and did not return till after the accident hereinafter mentioned occurred. After Van Court left, the boiler was hoisted about six inches above the brick foundation, and about four

feet, or a little more, above the floor, no one at that time being under it. When it was so hoisted, Brown and several of the men under him got on top of it and swung, surged and tested it, which, when done, Brown says he said, "It is all right," and then the men went back under the boiler. Tully, appellant's foreman, testified that Brown said, "All right, go ahead," and also testified that he, Tully, told Thomas Moren to go to work under the boiler after it was hoisted. In about five or ten minutes after Brown said it was all right, the boiler fell. Moren, at that time, was under the south end of it, working at the brick foundation, and was crushed by the falling boiler and killed.

At the close of the plaintiff's evidence her attorney dismissed the case as to the Merchants' Transfer Company, and the appellant, after the overruling of certain motions, which will be hereinafter considered, introduced evidence on the merits, and the case went to the jury. The jury found appellant guilty and assessed appellee's damages at the sum of \$5,000, for which sum judgment was rendered.

The declaration consists of a number of counts, in all of which, except the fifth, the negligence relied on is the failure to furnish ordinarily safe chains and appliances for the work of removing the boiler. These counts aver that the removal was made under the superintendence of the foreman of the Merchants' Transfer Company, and the engineer of appellant. The evidence is conclusive that only the employes of the Transfer Company were subject to the direction or control of that company, or its foreman; that Tully, appellant's foreman, had exclusive control of appellant's men; that appellant's part of the work was confined exclusively to the removal of the foundation of the boiler, and that the Transfer Company had nothing to do with the removal of the foundation, but only with the removal of the boiler itself. The only evidence offered by appellee in support of the allegation that ordinarily safe appliances were not used for the removal of the boiler was, that the boiler fell, and that a link of the chain broke or parted. What the

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defect was, whether it was patent or latent, or whether by the exercise of ordinary care it could have been detected on inspection, was not proved. This evidence was clearly insufficient as proof of negligence. *Sack v. Dolese et al.*, 137 Ill. 129; *Colfax C. & M. Co. v. Johnson*, 52 Ill. App. 383.

Appellant introduced evidence negating negligence in the matter of the appliances. Therefore the evidence did not warrant a recovery on the counts mentioned. The fifth count, after alleging necessary preliminary matters, avers, in substance, that after the boiler was hoisted above the foundation, Moren, appellee's intestate, and his co-laborers, were directed by Tully, the foreman, to work under the boiler, which they did; that it was well known to the appellant that to do so was dangerous, but unknown to Moren; that appellant, by its foreman, negligently failed to prevent Moren from going under the boiler, etc.

The question is whether the evidence is sufficient to support a verdict under this count. We are of opinion that it is. Tully, appellant's foreman, was warned by Van Court of the danger of being under the boiler while it was being hoisted or before it should be supported by blocks. His testimony is: "As a precautionary measure, I spoke to the foreman of the Chicago Edison Company, Mr. Tully, and told him he had better take his men from there, and keep them out until that boiler was hoisted and blocked up." Van Court, as heretofore stated, was the treasurer of the Merchants' Transfer Company, and had the general supervision of its business; he was the superior of Brown, the foreman of the company, and a warning from him (acquainted as he was with the perils of the business) of the danger of working under the boiler when hoisted above the foundation, carried with it peculiar force, and should not have been disregarded by Tully. Van Court had no authority over appellant's men, who were working under Tully; therefore all he could do was to advise Tully to keep them from beneath the boiler till it should be hoisted and blocked up. Tully took his men from under the boiler when so advised, but subsequently, while the boiler was hoisted and hanging by the

chains, ordered them under it. It is no excuse for this, if Brown said, after testing the condition of the boiler and hoisting appliances by swinging on the boiler when it was hoisted, "All right, go ahead." Brown had no control over Tully or over appellant's men working under Tully, and Brown testified that the only directions he gave were to the men of the Transfer Company, of whom he was foreman. We think it was a proper question for the determination of the jury, whether appellant, by its foreman, was guilty of negligence in ordering Moren to go under the boiler after it was hoisted and before it was blocked up, the foreman having been warned of the danger in so doing. It is clear that had Van Court's warning been heeded, Moren would not have lost his life as he did.

We think the verdict is sustained by the evidence, and that appellant's motion to take the case from the jury was properly overruled, and its instruction to that effect properly refused.

Appellant, at the close of appellee's evidence and also at the close of all the evidence, asked the court to give the following instruction: "There is no evidence tending to support the allegation of the first count of the second amended declaration; you will therefore find the defendant, the Chicago Edison Company, not guilty." A similar instruction was asked in respect to each count of the declaration. By each of the instructions the jury were authorized to find the defendant not guilty, generally, even though the evidence tended to support some other count than that designated in the instruction. On the hypothesis that the evidence tends to support the fifth count, which we hold it does, the instructions were properly refused. It is urged that the verdict is excessive. In this we can not concur. The deceased left surviving him, appellee, his widow, and four children, the eldest fourteen and the youngest three years of age, and the evidence is that while living he supported his family.

Other objections are urged by appellant's counsel, none of which we think tenable.

The judgment will be affirmed.

Chicago & N. W. Ry. Co. v. Emanuel Friend.

1. **EXPERT WITNESSES—Reports Prepared by Professional Expert—Compensation.**—A physician can not recover upon the basis of expert professional services for work which does not involve such services. In the absence of an express agreement as to compensation, he can only recover the fair value of the services actually rendered.

2. **SAME—Claims for Extra Compensation.**—An expert witness can not rest a claim to extra compensation upon the ground that his time is more valuable than the time of ordinary men.

3. **SAME—Compensation of Physicians and Lawyers as.**—A physician or lawyer can not sustain a claim for larger compensation than an ordinary man would be entitled to for the same services, upon the ground alone that as an expert in his profession, his time is more valuable than that of ordinary men. The service voluntarily rendered is not to be considered more valuable merely because of the greater value of the time of him who renders it, where no agreement is made beforehand as to the compensation to be paid.

Assumpsit, for physician's services. Appeal from the County Court of Cook County; the Hon. C. F. WHEAT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 19, 1899.

The appellee, who is a physician and surgeon in Chicago, sues to recover for professional services, which he claims to have rendered appellant under an alleged contract of employment. His own statement of the contract and what he did, is to the effect that he was called upon by a representative of the appellant, who inquired if he remembered treating a certain patient at the Central Free Dispensary of Rush Medical College two or three years before. He was then asked if he would "prepare a report" of his examination of said patient. Appellee said that to do this would necessitate his going to the college and spending more or less time, to which the railroad representative replied that appellee would be recompensed for that.

It appears that this report was desired to be used in the trial of a case then pending against appellant brought by the patient referred to. Appellee was told that such case would come up for trial in a day or two, and that the report

was desired as soon as possible. Subsequently, appellee was again called upon by the appellant's representative, who, after reading the report, asked him whether he was willing to go on the stand and testify according to his diagnosis, to which appellee replied that he was. He was then asked what the report was worth, and replied, one hundred dollars.

The testimony here is conflicting, appellee stating that appellant's employe said he had not the money with him, but would send a check for it; and the railroad employe himself stating that he told appellee he did not know whether the appellant would want him to testify or not, and that he inquired what appellee's bill would be for what he had already done in making out the report, to which appellee replied that it would be \$100. Appellant's employe then said, as he testifies, "Well, without stating my feeling I said to him, 'Well, Doctor,' and laughed, 'that is more money than I have got in my pocket;' and with that I walked out."

GEORGE F. HOLLOWAY, attorney for appellant; E. E. OSBORN, of counsel.

FRED. W. PROUDFOOT, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The report prepared by appellee, and for which he seeks to recover, is given in full in the abstract, where it occupies a little over a page. It is a statement of his examination of the patient, what the examination disclosed as to physical condition, and the medicine prescribed. Appellee states that he consulted certain medical works before making the report, and spent from nine to ten hours in its preparation, which included going to the college and returning to his office or house. It is with difficulty conceivable that the preparation of such a mere statement of the case could necessarily require an examination of medical authorities, or consume so much of time. But, however that may be, the question before us is as to the value of the services rendered; this appellee is undoubtedly entitled to recover.

There is no question as to the employment, nor that the service was rendered. But it is sought to recover for it as professional service upon the same basis as for medical or surgical work. Appellee himself says that a fair and reasonable fee would be, in his opinion, from one hundred to one hundred fifty dollars. This is, according to his testimony, upon the basis of expert professional services. And another physician called as a witness in behalf of appellee, testified evidently upon the same basis of value.

It is apparent, however, from an examination of the report, that its preparation did not involve expert professional service. The professional service had been rendered two or three years before, when the patient was first received. The preparation of the report, while it contained the results of such professional services, was not, in itself, expert professional labor, calling for expert knowledge or medical or surgical skill.

It is stated by appellee's counsel that he does not rest his cause upon any claim of account stated. Appellee might, of course, have made an agreement before he prepared or showed his report as to what his compensation should be. This was not done, and he can only recover now the fair value of the service actually rendered. In *Dixon v. The People*, 168 Ill. 179, on page 189, it is said that expert witnesses can not rest a claim to extra compensation upon the ground that their time is more valuable than the time of ordinary men.

It would seem to follow that a physician or surgeon or lawyer can not sustain a claim for larger compensation than an ordinary man would be entitled to for the same service, upon the ground alone, that as an expert in his profession his time is more valuable than that of such ordinary man. The service voluntarily rendered is not, in other words, to be considered more valuable merely because of the greater value of the time of him who renders it, where no agreement is made beforehand as to the compensation to be paid.

There is not sufficient evidence to enable us to act upon the suggestion of appellant's counsel and enter judgment here, for such amount as appellee is entitled to recover.

For the reasons indicated we are of opinion that testimony as to the value of appellee's time as an expert professional man was improperly admitted. In view of this conclusion it is not necessary to consider other questions presented.

The judgment of the County Court must be reversed and the cause remanded.

Mathilda Schneider v. John A. Burke and William S. Agar.

1. REPLEVIN—*When it Lies*.—Replevin can be maintained to recover property, taken under execution, where said property is not in the possession of and does not belong to the execution debtor.

2. EXECUTION—*When Issued Within Twenty Days After Entering Judgment*.—The statute forbids the issue of execution by a justice of the peace in a civil case until after the expiration of twenty days, unless the party applying for the same makes oath that he believes the debt will be lost unless execution is issued forthwith.

3. PRESUMPTIONS—*As to Justices Requiring Oath Before Issuing Execution*.—There are no presumptions in favor of a justice having required the oath as required by statute when issuing execution prematurely.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed December 19, 1899.

This is an action in replevin. The facts in the case are substantially as follows: One George Diehl and Marie Diehl, his wife, being apparently indebted to one Berger for \$1,000, made their judgment note, dated October 27, 1896, for that amount, and to secure said note executed a chattel mortgage upon their household goods, which was duly acknowledged and recorded in accordance with the statute. In November following, said note and chattel mortgage were assigned by the holder to one George Schneider. April 26th, following, appellee Agar recovered a judgment against George Diehl for \$200 before a justice of the peace, and execution was the same day issued

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thereon. Nine days thereafter the attorney of appellee Agar addressed a letter to Mrs. Diehl, stating that he had procured this judgment against her husband, that the latter had filed a schedule stating that said household goods were subject to the mortgage, but that he, said attorney, did not care anything for the mortgage, and should proceed immediately to levy if the judgment was not paid. This letter was brought to the knowledge of Schneider, the holder of the mortgage, about May 5th, and he then decided to foreclose. This was done, and the property sold May 15th to appellant. After the sale the property was all removed by appellant, the purchaser, to a house of her own which was then vacant, and Mrs. Diehl, who is the daughter of appellant, was allowed to move into the same house. May 22d thereafter appellee Burke, who is a constable, accompanied by appellees' attorney, proceeded to this house belonging to appellant, where the goods in question were, and where Mrs. Diehl and her daughter were then living, and levied upon the property which this suit was brought to recover.

The case was submitted to the court, a jury having been waived; the issues were found in favor of appellees and judgment rendered accordingly. From that judgment this appeal is prosecuted.

LACKNER, BUTZ & MILLER, attorneys for appellant.

OTHO D. SWEARINGEN, attorney for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

According to the statement of appellees' counsel in his brief, the only question in dispute was the issue raised by the pleas alleging that the property in question was the property of George Diehl, against whom the execution ran, under which the levy was made.

Appellant introduced in evidence a note for \$1,000, made by George and Marie Diehl, payable to one Robert Berger, the chattel mortgage securing the same upon the property

in controversy, and the bill of sale conveying the property to appellant, as the highest bidder therefor at public auction, under the chattel mortgage sale. Evidence was then introduced tending to show that appellant immediately took possession of the property so purchased by her, and moved it into a house of her own; that Mrs. Diehl and her daughters, their home being thus broken up, were permitted to go there, and that George Diehl and his son were living elsewhere at the time. This certainly made out a *prima facie* case in favor of appellant's right to the possession of the property. This evidence was not rebutted nor in any way denied. Appellee Burke testified that when he made the levy Mrs. Diehl said she was the owner of the property, and one of his appraisers who was with him corroborates him in this. They are contradicted in this respect by Mrs. Diehl's daughter. But assuming that Mrs. Diehl did make such statement, it is difficult to see how it tended to prove title in George Diehl, the husband, against whom alone the execution ran. That there was an actual change of possession and an open transfer of the property to appellant's possession is manifest from the uncontradicted evidence, and there is no evidence whatever in the record tending to show that it belonged to or was in the possession of the execution debtor, George Diehl.

The point is made by appellant that the execution under which the levy was made was issued by the justice of the peace the same day upon which he entered judgment, and there is no evidence that the party applying for the same made oath, as required by statute, that he believed the debt would be lost unless execution issued forthwith. Without such oath, the statute forbids the issue of execution by a justice of the peace in a civil case until after the expiration of twenty days. There are no presumptions in favor of such an act of a justice of the peace, whose jurisdiction is inferior and limited. But it is not now necessary to consider in this case the effect of an execution so prematurely issued.

The judgment of the Circuit Court must be reversed and the cause remanded.

H. H. Doyle v. Simeon F. Hall and Mary E. Hall.

1. **BANKRUPTCY—*Vested Rights of Parties Not Extinguished by Proceedings in.***—A pre-existing execution lien will not be divested upon the commencement of voluntary bankruptcy proceedings. The lien of an execution is just as valid as the lien of a mortgage; neither the property nor the lien is by such proceedings destroyed.

2. **SAME—*Filing a Petition of, Not a Compliance with the Provisions of the Statute Concerning Executions.***—The filing of the petition in bankruptcy in the United States District Court can not be considered as a compliance with the positive provision of the statute that a schedule by the defendant in the execution must be delivered to the officer having the execution, or filed in the court where the writ is issued.

Appeal from an order of the Circuit Court of Cook County, vacating a levy of execution; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed December 19, 1899.

Statement.—October 1, 1898, a judgment in favor of appellant and against appellees was entered in the Circuit Court of Cook County. The same day an execution based upon said judgment was issued and placed in the hands of the sheriff of said county. October 6, 1898, said sheriff made a demand upon said appellee Mary E. Hall, and October 7th, upon said appellee Simeon F. Hall, for money or property to satisfy said writ, and at the time of making such demand served upon each of the appellees a copy of said execution with notice indorsed thereon, signed by said sheriff, notifying each one of said appellees that they must respectively file a schedule of property within ten days in order to claim any exemption, all as provided by Sec. 14, Ch. 52, Rev. Stat. Afterward said execution was returned unsatisfied as to appellee Mary E. Hall.

October 17, 1898, Simeon F. Hall filed in the District Court of the United States for the Northern District of Illinois, the petition in bankruptcy of S. F. Hall & Co., the members of said firm being said appellees. The schedule accompanying said petition included the personal property upon which said execution was afterward levied.

November 1, 1898, said sheriff levied said execution upon the interest of appellees in certain personal property. November 3d, said bankruptcy proceeding came on to be heard in said United States Court, upon a motion for a rule upon said sheriff and the attorneys of said appellant to show cause why they should not be attached for contempt in making said levy. The same day it was by that court "ordered, adjudged and decreed that, said goods being exempt under the laws of the State of Illinois from levy, execution or attachment, are, therefore, exempt from administration under the bankruptcy law."

November 4th, upon the motion of appellees it was ordered by said Circuit Court that said levy of said execution be quashed, and that said sheriff turn over to appellees all the property upon which said execution had been levied, upon condition that appellees give a bond, as provided by said order. This appeal is prosecuted to reverse said order of said Circuit Court.

CHILDS & HUDSON, attorneys for appellant.

JOHNSON & McDANNOLD, attorneys for appellees.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

It is provided in Sec. 14, Ch. 52, Rev. Stat. of Ill., referred to in the preceding statement, that when copy of execution and notice are served upon an execution debtor, he shall, within ten days after such service, make a complete schedule of all his property, and file the same, duly verified, with the sheriff, or in the court where the execution issued.

The opening sentence of the printed argument of counsel for appellees, filed in this cause, is as follows:

"The only question presented to this court for adjudication under the issues in this cause is: Was the filing of the petition in bankruptcy a sufficient schedule, within the meaning and contemplation of the laws of the State of Illinois, requiring the filing of a schedule within ten days after the service of the execution?"

When said execution was placed in the hands of the sheriff, October 1, 1898, it at once became a lien upon the personal property of appellees in said county. Such lien is not divested by voluntary proceedings in bankruptcy. The "title and possession" of the bankrupt court is no better or more complete than the title and possession of a *bona fide* purchaser for value would be. A pre-existing execution lien would not be thereby divested in either case. The question now before us is not how or in what form the lien must be enforced, but whether the lien exists.

Counsel for appellees, in their said printed argument, also state as follows:

"If our reasoning is correct, that upon the filing of the petition in bankruptcy the title and possession was in the bankrupt court, then, so far as the State court and its process is concerned, the condition is the same as though the property had been annihilated, burned, destroyed, and out of existence."

We do not understand that to be a correct statement of the law. It will not be contended that the lien and security of a valid and *bona fide* mortgage, made in good faith prior to the commencement of voluntary bankruptcy proceedings, is discharged or divested by such proceedings. The title, possession and control of the property may pass to the bankruptcy court, but the vested rights of parties are not thereby extinguished. The lien of an execution is just as valid as the lien of a mortgage. Neither the property nor the lien is by such proceedings "annihilated, burned, destroyed, or put out of existence."

When the bankruptcy court ordered that said goods be returned to the appellees, because they were exempt from administration under the bankrupt laws, the "title and possession" of that court terminated. The rights of the parties to this case, to the property in question, were thereafter the same as though such bankruptcy proceedings had never been commenced, and then the power to adjudicate, as between the parties to this suit, the questions of whether the property levied upon is exempt, and whether appellees have waived their right of exemption under the

statute of this State, is in the State court and not in the Federal court.

It seems from this record that the only reason presented to, or considered by, the Circuit Court as to why said levy should be quashed, was that of the bankruptcy proceedings, and the order entered in the bankruptcy court. No testimony was offered upon any other theory or issue. We are not therefore inclined to do more than to say that upon that issue the motion should have been overruled. The order in the bankruptcy court was not such an adjudication as to estop the Circuit Court from inquiring and determining, as between the parties to this suit, concerning the exemption of the property levied upon.

The exemption of personal property is a statutory right. While this court is not inclined to hold that the statute must be strictly construed in every detail, yet there must be a fairly reasonable compliance with its provisions. The provision is positive that a schedule by the defendant in the execution must be delivered "to the officer having the execution" or filed "in the court where the writ is issued." The filing of the petition in bankruptcy in the United States District Court can not be considered as a compliance with the positive provision of the statute. Neither was the jurisdiction of the Circuit Court permanently ousted by the fact that the property was temporarily within the possession and control of the United States Court.

The order of the Circuit Court, entered November 4, 1898, is reversed and the cause remanded for further proceedings, not inconsistent with the views here expressed.

Independent Electric Co. v. W. F. Donald and W. T. F. Donald, as Donald Brothers.

1. APPELLATE COURT PRACTICE—*Abstract Containing No Assignment of Errors.*—Where it does not appear from the abstract filed that there is any assignment of errors upon or attached to the record, the Appellate Court may dismiss the case.

Williams v. Chicago Exhibition Co.

2. **BILLS OF EXCEPTIONS—*Must be Signed and Sealed.***—Where a bill of exceptions is not signed and sealed by the judge by whom the same is made, it can not be considered by the Appellate Court.

Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed December 19, 1899.

GEORGE W. BROWN, attorney for plaintiff in error.

PAM, DONNELLY & GLENNON, attorneys for defendants in error.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

It does not appear from the abstract filed in this case that there is any assignment of errors upon or attached to the record. For that reason this case might be dismissed. (See Rule 12 of this court.)

Counsel for defendants in error, in their brief, call attention to the fact that the bill of exceptions is not "signed and sealed by the judge by whom the same is made." We can not therefore consider said bill of exceptions. The opinion of the Supreme Court upon this point is conclusive, and has been followed and cited so many times by the Appellate Courts that we do not feel called upon to again cite or review the cases. *Farmers' Trust Co. v. Kimball*, 84 Ill. App. 613.

The judgment of the Circuit Court is affirmed.

Lucas R. Williams v. Chicago Exhibition Co. et al.

1. **WASTE—*Action for, at Common Law.***—At common law, an action for waste may be maintained by a reversioner or remainderman in fee, for life, or for years, provided the injury affects the reversion.

2. **SAME—*Defined.***—Waste is an injury to property to the prejudice of the heir or of him in reversion or remainder, or, as expressed in Blackstone's Commentaries, "to the disherison of him that hath the remainder or reversion in fee simple or fee tail."

8. **SAME—What is Necessary to Sustain Claim.**—To sustain a claim for waste it is essential that the act complained of shall be to the injury of the party complaining.

4. **SAME—Can Not be Maintained by Mortgagee—Remedy in Case.**—An action of waste can not be maintained by a mortgagee because he has only a contingent interest. His common law remedy, if any, is an action on the case.

5. **INJUNCTION—When a Court of Chancery Will Not Interfere at Instance of Mortgagee.**—If the security or contingent interest of a mortgagee will not be injured, or his security injuriously impaired by an act of spoliation which might constitute waste as against the rights of the owner of the fee, a court of chancery will not, at his instance, interfere by injunction.

6. **WORDS AND PHRASES—“Impair the Security of the Mortgage.”**—The term “impair the security of the mortgage,” does not necessarily mean the same as impairing the value of the property mortgaged.

Bill for Injunction.—Error to the Circuit Court of Cook County; The Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed December 19, 1899.

A. MORRIS JOHNSON and KEENE H. ADDINGTON, attorneys for plaintiff in error, contended that to constitute waste, the acts complained of must either diminish the value of the estate or increase the burdens upon it, or impair the evidence of title to him who has the inheritance. It has been held that the destruction of buildings is waste, provided the destruction of such buildings results in lasting injury to the inheritance as it will come to the reversioner. 28 Am. & Enc. of Law, 885; Davenport v. Magoon, 13 Ore. 3.

The tenant has no right to pull down valuable buildings or to make improvements or alterations which will materially and permanently change the nature of the building. Winship v. Pitts, 3 Paige (N. Y.), 259.

The appropriate remedy for a mortgagor against a mortgagor in possession, who is impairing the security by committing waste, is by a bill in chancery for an injunction, and it is not necessary to allege or prove the mortgagor's insolvency, nor is it generally necessary to prove that the injury threatened is literally irreparable. It is sufficient if there be no adequate remedy by an action for damages. 28 Am. & En. Enc. of Law, 933.

Fixtures are embraced in a mortgage and a bill may be properly filed by the mortgagee for an injunction to prevent the commission of waste by their removal. *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246.

The removal of a building or improvement permanently attached to the freehold is *per se* an injury to the freehold, and therefore waste. 28 Am. & En. Enc. of Law, 885; *Dorr v. Dudderar*, 88 Ill. 107; *Winship v. Pitts*, 3 Paige (N. Y.) 259.

PAM, DONNELLY & GLENNON, attorneys for defendants in error.

Before a mortgagee is entitled to an injunction to prevent the mortgagor in possession from committing waste, it must affirmatively appear that unless the waste is restrained, the security of the mortgagee will be rendered inadequate and insufficient to pay the mortgage debt. *Moriarity v. Ashworth*, 43 Minn. 1; *Buckout v. Swift*, 27 Cal. 433; *King v. Smith*, 2 Hare, 244; *Perrine v. Marsden*, 34 Cal. 14; *Moses v. Johnson*, 88 Ala. 517; *Cook v. Miller*, 26 Ill. App. 421; *Fairbank v. Cudworth*, 33 Wis. 358; *Miller v. Waddingham* (Cal.), 27 Pac. Rep. 750; *Vanderslice v. Knapp*, 20 Kan. 647; *Van Wyck v. Alliger*, 6 Barb. 511; *Hippesley v. Spencer*, 5 Madd. 422; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25.

A court of equity will not restrain a threatened trespass, except upon a showing that the alleged trespasser is insolvent, or that irreparable injury will result. *Commissioners of Highway v. Green*, 156 Ill. 504; *Harms v. Jacobs*, 158 Ill. 505; *Robinson v. Russell*, 24 Cal. 467; *C. P. S. Exch. v. McClaghry*, 148 Ill. 372; *Gause v. Perkins*, 3 Jones' Eq. 177.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

A bill in chancery was filed by Elizabeth Lawrence as mortgagee, to foreclose a mortgage upon the premises in question. After final decree in said foreclosure proceedings said Lawrence assigned the decree to plaintiff in error. No

question arises in this case as to the correctness of that foreclosure or the validity of the assignment of said decree. The bill in this case was filed to restrain defendants in error from committing what was alleged to be waste.

After said foreclosure proceedings were at issue, the defendant in error erected upon said premises a boiler house and placed therein several boilers, which were attached to the freehold. Afterward, defendants in error, as counsel for plaintiff in error state it, "asserted their right to remove" said building and boilers under some contract with Gay Dorn, the owner of the fee to said premises, subject to the lien of said decree. What that contract was does not appear. A temporary injunction was issued, without notice, upon the filing of the bill in this case. The Austin Manufacturing Company, one of the defendants in error, moved to dissolve said temporary injunction "upon the face of the bill." That motion was sustained and said temporary injunction was dissolved. The only relief sought by the bill in this case was an injunction. When that was dissolved the bill was dismissed, and this appeal prosecuted. No testimony was offered by either party, and no answer to said bill was filed. Leave was granted to defendant in error, the Austin Company, to file its suggestion of damages. The errors assigned are the dissolving of said injunction and the granting leave to file suggestion of damages. The whole theory and purpose of this bill is to prevent threatened waste. At common law, an action for waste may be maintained by a reversioner or remainderman in fee, for life or for years, provided the injury affects the reversion. But such an action can not be maintained by a mortgagee because he has only a contingent interest. His common law remedy, if any, is an action on the case. As there was no adequate remedy at common law for the protection of mortgagees, courts of chancery assumed jurisdiction so as to afford such protection. But it does not follow that every act of spoliation which might constitute waste as against the rights of the owner of the fee, subject to a mortgage, will be restrained by a court of equity at the instance of the mortgagee. If the security or contingent

interest of a mortgagee will not be injured or his security injuriously impaired, a court of equity will not, at his instance, interfere by injunction, to restrain what might be waste as to the owner of the fee. The mortgage referred to was given to secure the payment of the sum of \$5,000, and was upon three lots and a part of another lot. After said foreclosure bill was filed and before the decree referred to was assigned to plaintiff in error, \$3,000 was paid on account of said mortgage debt, and one of said three lots was released. Said decree is for the sum of \$2,312.10 and \$150 solicitor's fees.

The bill in the case at bar does not state the value of said lots or either of them. Neither does it charge that the lots upon which the decree is still a lien, are not exclusive of the property, the removal of which is threatened, full and ample security for the amount due upon said decree. Nor is there any averment that either of the defendants against whom said decree was entered, or the said defendants in error, or any or either of them, is or are insolvent. There is no statement of any fact or facts in the bill in this case showing that plaintiff in error will be damaged to any extent whatever, if the property claimed by defendants in error is removed. The only thing in the bill as to that is the general allegation that the security of plaintiff in error will be impaired, and the amount that said premises will bring at a sale will be largely decreased. There is no allegation but that said premises at such a sale would bring many times the amount due upon said decree.

On behalf of plaintiff in error it is contended that if the removal of said building and boilers would be waste *per se*, then a court of chancery will restrain such removal whether the mortgagee be solvent or insolvent, and whether such removal would render the security inadequate or not.

Waste is some injury to property "to the prejudice of the heir or of him in reversion or remainder," or as expressed in Blackstone's Commentaries, "to the disherison of him that hath the remainder or reversion in fee simple or fee tail."

To sustain a claim for waste it is essential that the act complained of shall be to the injury of the party complaining. There may be such an act or injury to real estate as would constitute waste against the remainderman in fee, which would not be waste as against a mortgagee such as to warrant the interference of a court of chancery by injunction. Courts of chancery have frequently entertained jurisdiction at the instance of mortgagees, to restrain waste. The reason why such jurisdiction was assumed was to prevent irreparable injury. But where no injury to the mortgagee will result, no reason appears for assuming such jurisdiction. Where the reason for assuming equity jurisdiction fails or does not exist, such jurisdiction should not be assumed or exercised.

The case of *Moriarty v. Ashworth*, 43 Minn. 1, was a proceeding by a mortgagee to restrain waste by a mortgagor in possession. The Supreme Court there states so clearly what seems to us to be the correct rule that we quote it at length :

“ While some authority may be found in support of the claim of the appellant, that a mortgagee is entitled to an injunction restraining any acts of waste by a mortgagor in possession, which may diminish the value of the mortgaged property, yet the great weight of authority, both in England and in this country, is to the effect that equity will not interfere in such cases unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt or of doubtful sufficiency. *King v. Smith*, 2 Hare, 239; *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hippesley v. Spencer*, 5 Madd. 422; *Harper v. Aplin*, 54 Law T. (N. S.) 383; *Coker v. Whitlock*, 54 Ala. 180; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Buckout v. Swift*, 27 Cal. 433; *Vanderslice v. Knapp*, 20 Kan. 647; *Harris v. Bennon*, 78 Ky. 568; *Van Wyck v. Alliger*, 6 Barb. 507, 511; *Snell*, Eq. 304; 1 Wats. Comp. Eq. 746; 2 Story, Eq. Jur. 915; *High, Inj.* (2nd Ed.) 693, 694; *Bisp. Eq.* (4th Ed.) 433; 1 Jones, *Mortg.* (4th Ed.) 684; 1 Lead. Cas. Eq. (4th Am. Ed.) 992, 1021; *Kerr, Inj.* (2nd Amer. Ed.) 84. In numerous other cases we find that the courts, in stating the grounds upon which equity will interfere, seem to regard it as a necessary condition that the sufficiency of the security be threatened. See *Cooper v. Davis*, 15 Conn. 556; *Gray*

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v. Baldwin, 8 Blackf. 164; Hastings v. Perry, 20 Vt. 272; Fairbank v. Cudworth, 33 Wis. 358. From the proposition which we have stated as an established principle of equity, it is not to be understood that equity will not interfere unless the acts threatened are such as may reduce the value of the mortgaged property below the amount of the debt. On the contrary, as was considered in King v. Smith, 2 Hare, 239, we think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of doubtful sufficiency. He is entitled to have the mortgaged property preserved as sufficient security for the payment of his debt, and it is not enough that its value may be barely equal to the debt."

The same principle seems to be recognized in Miller v. Cook, 135 Ill. 190; Cook v. Miller, 26 Ill. App. 421, and 31 Ill. App. 577.

The holding by the Supreme Court of Minnesota is supported by the following cases in addition to those there cited: Perrine v. Marsden, 34 Cal. 14, 18; Van Wyck v. Alliger, 6 Barb. 507, 511; Moses v. Johnson, 88 Ala. 517, 521.

Cases may be found which hold that the whole estate is security to the mortgagee and that the mortgagor ought not to be allowed to diminish it. State v. N. C. Ry. Co., 18 Md. 193, 213. In nearly all the cases cited by counsel for appellant, as well as other cases examined, the courts hold that an injunction will be sustained to prevent the mortgagor from impairing the security of the mortgage. In but few cases is there any discussion as to the meaning of the term "impair the security of the mortgage." As we have said, this term does not necessarily mean the same as impairing the value of the property mortgaged.

There was no error in the order dissolving the temporary injunction issued in this case. The judgment of the Circuit Court is affirmed.

Richard C. Gunning v. The People, etc.

1. **PUNISHMENT—Defined.**—Punishment as defined in the Century Dictionary is "Pain, suffering, loss, confinement or other penalty inflicted on a person for a crime or offense, by the authority to which the offender is subject; a penalty imposed in the enforcement or application of law."

2. **SAME—Removal from Office.**—Removal from office is punishment.

3. **PENALTY—Defined.**—The Century Dictionary defines "Penalty" to be "suffering, in person or property, as a punishment annexed by law or judicial decision to a violation of law."

4. **SAME—Denotes Punishment, Whether Corporal or Pecuniary.**—Strictly and primarily the words "penal" and "penalty" denote punishment, whether corporal or pecuniary, imposed and enforced by the State for a crime or offense against its laws.

5. **WORDS AND PHRASES—With Different Meanings—Construction of Statutes.**—When a word, which may in its application have different meanings, is used in a statute, the sense in which such word is used by the legislature should control in construing and applying such statute; and where such word appears several times in the same chapter of the statute, and the sense in which it is used clearly appears in some sections, it may materially aid in determining the sense in which it is used in other sections of the same chapter.

6. **CRIMINAL CODE—Indictment and Conviction for Embezzlement Under Sec. 208, Not Lawful.**—A person can not be lawfully indicted and convicted of embezzlement under Sec. 208 of the Criminal Code because special provision has been made for the punishment of that offense in Sec. 287 and 288 of the Revenue Act.

7. **SAME—Intention of the Legislature.**—It is unreasonable to believe that the legislators intended that an assessor should be punished under sections 287 and 288 of the Revenue Act (Hurd's R. S. 1899, 1442), and also under Sec. 208 of the Criminal Code. (Hurd's R. S. 1899, 604.)

Indictment for Embezzlement.—Error to the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed December 19, 1899.

EDWARD H. MORRIS, attorney for plaintiff in error.

Defendant below was not punishable under the section of the criminal code under which he was tried, convicted and fined, his punishment being specially provided for by the revenue act, and he being excluded from punishment under it, if punishable under any other act. Sec. 208, para-

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agraph 352, Chap. 38, Starr & Curtis' Statutes, Vol. 1, p. 1327, 2d Ed.; Sec. 287 and 288, paragraph 289 and 290, Chap. 120, Revenue Act, Vol. 5, Starr & Curtis Statutes, p. 3518.

A general provision is not applicable when there is a special one. *Stoker v. People*, 114 Ill. 320.

The imposition of a penalty "involves the idea of punishment, whether enforced by civil or criminal procedure. *Anderson's Dictionary of Law*, 763; *Wolverton et al. v. Taylor et al.*, 132 Ill. 206.

Sec. 208 of the Criminal Code excepts and excludes an official from punishment under it if his punishment is specially provided for by any other act. Punishment as here used, means removal from office or recovery of penalty by either civil or criminal procedure. *Cummings v. Missouri*, 4 Wall. (U. S.) 277; *Beggs v. State*, 122 Ind. 54; *State v. Smith*, 7 Conn. 428; 4 Black. Com. 377.

CHARLES S. DENEEN, State's Attorney, for defendant in error, A. S. TRUDE and W. M. McEWEN, of counsel, contended that a man may be punishable under different sections of the criminal code, citing *George v. The People*, 167 Ill. 447, where an attorney who collected money upon a judgment and embezzled it was convicted under the general embezzlement statute.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

At the February term, 1898, the grand jury of Cook county returned an indictment containing thirty counts, against plaintiff in error, charging him with palpable omission of duty in his office as assessor of the town of South Chicago, in said county.

The first two counts of the indictment, charging a failure to produce assessment books before the town board of review, were quashed. A motion by plaintiff in error to quash the other counts was overruled and the case tried by a jury upon the remaining twenty-eight counts. Fourteen

of these counts charge a palpable omission of duty on the part of plaintiff in error in that he, as a member of the town board of review of the town of South Chicago, willfully voted in the affirmative to adjourn the said board of review *sine die*, and by so voting did adjourn said board *sine die* before it had passed upon and heard the complaints filed before it. The remaining counts charged that he was guilty of a palpable omission of duty in that he did not, between May 1, 1897 and July 1, 1897, assess all of the property, real and personal, subject to assessment in the town of South Chicago.

The trial resulted in a verdict finding the plaintiff in error guilty, and after overruling a motion for a new trial and a motion in arrest of judgment, the court entered judgment on the verdict and imposed a fine of \$2,000 upon the plaintiff in error, to reverse which he sued out this writ of error.

All of the counts of the indictment except the two which were quashed, charge a violation of Sec. 208, Chap. 38, Rev. Stat., being the Criminal Code. The indictment, conviction and fine are under this section. The duties or acts which it is alleged the defendant did not perform are those required by Sec. 76 and 86, Revenue Act (Ch. 120). Said Sec. 208 of the Criminal Code, eliminating that part not applicable to this case, is as follows:

“Every person holding any public office (whether State, county or municipal), trust or employment, who shall be guilty of any palpable omission of duty * * * or who shall be guilty of willful and corrupt oppression, malfeasance or partiality, where no special provision shall have been made for the punishment thereof, shall be fined not exceeding \$10,000, and may be removed from his office, trust or employment.”

Said section 208 is general in its terms, but it is conceded in the printed arguments filed herein that it does not reach such cases as this, if some special provision has been made to cover the offense here charged.

Said section 76 of the revenue act provides that assessors shall, between the first day of May and the first day of July

in each year, actually view and determine as near as may be, the actual cash value of each lot or tract of land listed for taxation, etc.

Said section 86 provides in substance, that the assessor, clerk and supervisor of each town shall meet on the fourth Monday of June, consider complaints as to assets, revise and correct the same, and adjourn from day to day until they shall have finished the hearing of all cases presented to them.

The indictment charges that plaintiff in error is guilty of the offense described in each of these sections, and the jury found him guilty. The revenue act, which provides the duties of assessors, also provides certain penalties to be imposed upon officials who violate its provisions. The two sections applicable to assessors are as follows :

Section 287. "If any officer shall fail or neglect to perform any of the duties required of him by this act, upon being requested so to do by any person interested in the matter, he shall be liable to a fine of not less than \$10 nor more than \$500, to be recovered in an action of debt in the Circuit Court of the proper county, and may be removed from office at the discretion of the court, and any officer who shall knowingly violate any of the provisions of this act shall be liable to a fine of not less than \$10 nor more than \$1,000, to be recovered in an action of debt, in the name of the people of the State of Illinois, in any court having jurisdiction, and may be removed from office, at the discretion of the court, and said fines, when recovered, shall be paid into the county treasury."

Section 288. "Every county clerk, assessor, collector or other officer, who shall in any case refuse or knowingly neglect to perform any duty enjoined upon him by this act, or who shall consent to or connive at any evasion of its provisions, whereby any proceeding required by this act shall be prevented or hindered, or whereby any property required to be listed for taxation shall be unlawfully exempted, or the same be entered upon the tax list at less than its fair cash value, shall, for every such offense, neglect or refusal, be liable, on the complaint of any person, for double the amount of the loss or damage caused thereby, to be recovered in an action of debt, in the name of the people of the State of Illinois, in any court having jurisdiction, and

may be removed from his office, at the discretion of the court."

If in the two sections last quoted there is "special provision" for the "punishment" of an assessor, within the meaning of the terms used in said section 208 for the offense detailed in this indictment, then this conviction of plaintiff in error can not be sustained. Or, in other words, would the imposition of a fine and the removal from office, under the provisions of said two sections, or either one of them, be "punishment" in the sense in which that word is used in said section 208 of the Criminal Code?

In the printed argument filed in behalf of defendant in error it is contended that plaintiff in error could not have been successfully prosecuted under the first part of said section 287, which is there quoted, nor under said section 288. But there is in such printed argument no reference to, or discussion of, the last part of said section 287. That should be construed as being as separate and distinct from the first part of the section as though it was a separate section.

"Punishment" as defined in the Century Dictionary is "pain, suffering, loss, confinement or other penalty inflicted on a person for a crime or offense, by the authority to which the offender is subject; a penalty imposed in the enforcement or application of law."

The same authority defines "Penalty" to be "suffering, in person or property, as a punishment annexed by law or judicial decision to a violation of law."

See also Bouvier's Law Dictionary; Potter's Dwarrris on Statutes, p. 74; Anderson's Dic. of Law, 763; 4 Blackstone, 7; *Wolverton v. Taylor*, 132 Ill. 197, 206; *State v. Smith*, 7 Conn. 430.

In *Huntington v. Attrill*, 146 U. S. 657, 667, it is stated that "Strictly and primarily, they (the words 'penal' and 'penalty') denote punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offense against its laws." *U. S. v. Reisinger*, 128 U. S. 398, 402; *U. S. v. Chouteau*, 102 U. S. 603, 611.

When a word, which may in its application have different

meanings, is used in a statute, the sense in which such word is used by the legislature should control in construing and applying such statute. Where such word appears several times in the same chapter of the statute, and the sense in which it is used clearly appears in some sections, that may materially aid in determining the sense in which it is used in other sections of the same chapter.

The word "punishment" is used many times in said Criminal Code. Section 208b which, with said section 208, is under the general heading of "Misconduct of Officers," provides that an officer guilty of fraud in the expenditure of public moneys shall be "punished" by fine or by imprisonment, or by both. In some sections of said chapter 38 it is provided that "punishment" shall be by fine *and* imprisonment, as in sections 119, 42o, 54n and 120—in others by fine *or* imprisonment, as in sections 9e, 39m, 42h, 117-125b, 137e, 269d and 292—and in still others by fine only, the same as in said sections 287 and 288 of the revenue act, as in sections 9a, 9p, 9q, 541 and 269c.

A person could not be lawfully indicted and convicted of embezzlement under said section 208, because "special provision" has been made for the "punishment" of that offense. But certain phases of embezzlement may be punished by fine only. See Sections 78 and 79 of the Criminal Code.

Neither can it be concluded from the fact that the fines provided for in said sections 287 and 288 of the revenue act are to be recovered "in an action of debt in the name of the people of the State of Illinois" that the penalty there imposed is not "punishment" within the meaning of that word as used in said section 208 of the Criminal Code. Section 269d of the Criminal Code provides that certain officers shall be punished by fine. Section 269g provides that such fine may be recovered in an action of debt in the name of the people in the same words used in said sections of the revenue act.

Again said sections 287 and 288 of the revenue act provide that for the offenses there described a person found

guilty may be removed from office. That is punishment. *Cummings v. State of Missouri*, 4 Wall. (U. S.) 277.

In the Missouri case a Roman Catholic priest was indicted and convicted in a Missouri State court for teaching and preaching without having first taken an oath prescribed by the Constitution of that State. That was held by the Supreme Court of the United States to constitute punishment. See p. 320 *et seq.*

The penalties which might be imposed under said sections 287 and 288 of the revenue act, constitute "punishment" in the sense in which that word is used in section 208 of the Criminal Code. The indictment and conviction of plaintiff in error under said section 208 is erroneous.

Section 74 of the Criminal Code provides that "Whoever embezzles * * * shall be deemed guilty of larceny." Section 79 of that chapter provides that "if any * * * constable * * * shall fail or refuse to pay over any money collected by him * * * he shall be fined * * * or confined in the county jail," etc.

In *Stoker v. People*, 114 Ill. 320, said Stoker had been indicted and convicted under said section 74. There was no provision in that section, as there is in said section 208, relating to "special provisions * * * for the punishment" of a guilty party, and yet the Supreme Court says (p. 324):

"It is true that the word 'whoever,' used in section 74, has a broad and comprehensive meaning, but at the same time it is unreasonable to believe that the legislature intended that a constable should be prosecuted under both sections of the statute."

The judgment in that case was therefore reversed and the cause remanded.

There can be no doubt of the fact that the defendant in the case at bar was liable to be prosecuted and convicted under the "special provisions" of said sections 287 and 288 of the revenue act. As it is said in the *Stoker* case, it is unreasonable to believe that the legislature intended that an assessor should be punished under said sections 287 and 288, and also under said section 208 of the Criminal Code.

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The reasoning in the Stoker case is conclusive when applied in the case at bar.

For the reason indicated, the judgment of the Criminal Court must be reversed and the cause remanded.

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1. **APPELLATE COURT PRACTICE—Filing Supplemental Records.**—An application for an extension of time within which to file a supplemental record should be made within the first two days of the term.

2. **SAME—Damages on Dismissal of an Appeal.**—Where a decree is not for the payment of money within the meaning of Sec. 78 of the Practice Act, statutory damages are not allowable.

Motion to Dismiss Appeal.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Dismissed. Opinion filed December 19, 1899.

BENJAMIN M. THOMAS, attorney *pro se*.

LEVI SPRAGUE, attorney for appellee John O'Brien Lumber Co.

DUNN & BYRON and JOHN T. DONAHUE, attorneys for appellees Von Platen & Dick, A. T. Stewart & Co., Holmes & Awburn, and Gray, Tuthill & Co.

CHARLES H. HAMILL, attorney for appellees Aaron B. Mead and Samuel Knowlton.

MR. JUSTICE SHEPARD delivered the opinion of the court.

A "short record" (consisting of the decree, appeal order and appeal bond) was filed in this cause on the second day of the October term, 1898, of this court. On the eleventh day of the said term, diminution of the record was suggested and leave given to file, instant, a supplemental record, which was done.

The leave so given was granted out of a desire by the court to afford to appellant additional time within which to perfect his appeal, but under a misapprehension of the law. The appellee Lumber Company moved upon a short record brought up by it, in this cause, to have the appeal dismissed with statutory damages, and such motion was taken to be considered when this appeal should be reached. The application for an extension of time within which to file the supplemental record should have been made within the first two days of the term. Afterward was too late, and the additional time allowed by the order was something this court had no power to grant.

The supplemental record having been filed under an improvident and erroneous order, must therefore be stricken from the files, and the "short record" being insufficient to found any of the assigned errors upon, the appeal must, in accordance with the statute, be dismissed. Sec. 72, Practice Act, Chap. 110, Rev. Stat.; *O'Kane v. West End Dry Goods Store*, 79 Ill. App. 191.

And to the numerous authorities there cited, we add *Ross v. Plano Steel Works*, 34 Ill. App. 323; *Mason v. Gibson*, 13 Ill. App. 463; *Palmer v. Gardiner*, 77 Ill. 143; *Chicago City Ry. Co. v. Smith*, 82 Ill. App. 305, and the still later and conclusive case (if there were doubt before) of *Gadwood v. Kerr*, 181 Ill. 162.

But the decree is not one for the payment of money within the meaning of Sec. 73 (Rev. Stat. 1898, Sec. 74), Practice Act.

The proceeding was to enforce mechanic's lien claims, and the decree found the amounts of the several liens, and ordered the premises sold unless the liens were paid in three days.

Such a decree is an alternative one, and not one for the recovery of money. Statutory damages are, therefore, not allowable. *Arentz v. Reilly*, 67 Ill. App. 307; *Hamburger Company v. Glover*, 157 Ill. 521.

The order will be that the supplemental transcript of the record filed herein October 14, 1898, be stricken from the

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files, and the appeal dismissed for failure by appellant to file record as required by law, and statutory damages denied. Appeal dismissed.

OPINION PER CURIAM.

The appellee Lumber Company brought to this court a short record in the above entitled cause and moved that appellant's appeal be dismissed with statutory damages. The motion was reserved to be considered upon the hearing of the same cause upon a record previously brought up by appellant. That record having now been considered, and the appeal dismissed, without statutory damages, the motion to dismiss with damages is denied, and the appeal docketed under this number is dismissed at the costs of the appellee Lumber Company. Appeal dismissed at costs of appellee.

Ignatz Goldfinger v. F. S. Waters & Co. et al.

1. APPELLATE COURT PRACTICE—*When a Decree Will Be Affirmed.*—When the record consists of a copy of the decree and appeal bond, with a supplemental transcript of an answer filed by the appellant, and his brief raises no question reviewable by this court, the decree appealed from will be affirmed.

Bill to Set Aside Fraudulent Conveyances.—Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed Opinion filed December 19, 1899. Rehearing denied.

BLUM & BLUM, attorneys for appellant.

WILBUR, TURNER & HILL and REMY & MANN, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court. This purports to be an appeal from a decree in chancery. The record consists of a copy of the decree and appeal bond, with a supplemental transcript of an answer filed by the appellant.

The brief for appellant is not in any respect, except that it is printed and is short, in compliance with Rule 20 of this court respecting "Briefs."

So far as we can discover from the so-called brief, not a single question is raised that is reviewable by us with only the decree and an answer before us.

The decree is affirmed.

Mr. Justice FREEMAN, having heard the cause below, takes no part in the decision here.

Chicago Tip & Tire Co. v. Robert F. Beardsley et al.

1. QUESTION OF FACT—*Breach of a Contract.*—Whether a contract has been violated by the delivery of goods which were defective, and by reason of such defects, unmerchantable, is a question for the jury.

Assumpsit.—Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 19, 1899.

WICKERSHAM & HAYNER, attorneys for appellant.

HENRY S. SHEDD, attorney for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit in assumpsit to recover for goods sold under a written agreement and delivered by appellees to appellant.

The only point urged by appellant's counsel is "that the evidence is overwhelming that the appellees violated their contract." This violation is said to consist in furnishing bicycle spring seat posts, defective in workmanship and material, which were not good and merchantable. There is testimony tending to show that the posts in controversy were in many cases returned to appellant by parties to

whom they had been sold, and that in some instances appellees took back from appellant such returned posts and replaced them with new ones of an improved style, differently manufactured. There is also testimony to the effect that the metal used in certain selected posts complained of, did not possess sufficient strength and durability for the purpose, and that appellant had paid seven hundred dollars on account, upon condition that if appellees did not make the posts satisfactory, their money would be returned, and this amount, it is claimed, appellant was entitled to have allowed as a set-off. It is said that the contract was an entire contract, and that there was an implied warranty that the posts would be of a fairly and reasonably good quality, and suitable for the purpose for which they were to be used. It is contended that instead of a verdict for appellees, a verdict should have been returned in favor of appellant for money paid in advertising the posts, in addition to the money paid on account.

The agreement in writing between the parties provided that appellant should have exclusive sale of the posts, pay a certain agreed price for each one, and that on the fifteenth of each month settlement should be made for posts previously delivered. All that the appellees agreed to do under that contract, was to give to appellant "full and exclusive control of the sale of the Beardsley Patent Spring Seat Posts (patents covering which are owned and controlled by said party of the first part) subject to" certain conditions which are set forth.

There is evidence tending to show that appellees are making an improved style of post, better than those which had been delivered to appellant, for which recovery is in this case sought. But the real question is whether the contract was violated by delivery of posts which were defective, and by reason of such defects, unmerchantable. This was a question for the jury, and there was ample evidence to sustain their finding.

One of appellant's witnesses testified that the posts were the same in design and pattern as the ones appellees were

making and delivering at the time the contract was made. Appellant seems to have received what it contracted for, in these respects at least, and that the posts were defective in other ways is not established. If the contract was one-sided, it was of their own making.

The judgment of the Superior Court must be affirmed.

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William Hough v. George Wells, Aaron B. Mead, Trustee, Albert L. Coe, Successor in Trust.

1. MORTGAGE FORECLOSURE—*Solicitor's Fees*.—Where a trust deed provides for the allowance of a solicitor's fee equal to five per centum upon the amount of the principal and interest in case of default, and a bill is filed to foreclose, it is proper to allow such a fee, an attorney practicing at the Chicago bar having testified that a solicitor's fee equal to five per centum upon the amount found due is a customary and reasonable fee in the cause.

2. DEPOSITIONS—*Objections, When to be Taken*.—Objections that depositions taken before the master are not signed by the witnesses should not be made for the first time in this court.

3. APPELLATE COURT PRACTICE—*Statutory Damages on Affirmance*.—Where an appeal or writ of error is prosecuted only for delay, a motion to affirm the judgment or decree, with statutory damages, is proper.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed, with five per cent damages. Opinion filed December 19, 1899.

CHARLES PICKLER, attorney for appellant.

CHARLES H. HAMILL, attorney for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This appeal is from a decree of sale in a mortgage foreclosure proceeding. The decree finds that there is due to the appellee, for principal and interest, \$2,268.68, and for solicitor's fees five per centum thereon, to wit, \$113.43, and orders a sale of the mortgaged premises unless the amount found due be paid within five days.

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The only errors urged are (1), the allowance of solicitor's fees, and (2) that the depositions of the witnesses who testified before the master are not signed, and their signatures were not waived.

The trust deed provides for the allowance of a solicitor's fee equal to five per centum upon the amount of the principal and interest, in case of default, and a bill being filed to foreclose. In addition thereto, it was testified, by an attorney practicing at the Chicago bar, that a solicitor's fee equal to five per centum upon the amount found due was a customary and reasonable fee in the cause. There was no error in respect of the solicitor's fee. *Springer v. Cochran*, 84 Ill. App. 644.

The objections that the depositions taken before the master are not signed by the witnesses is first made in this court.

This might have been good ground to suppress the evidence had a motion been entered in the Circuit Court for that purpose, but appellant has waived the objection by his silence. Made for the first time in this court, the objection comes too late. *Jones v. King*, 86 Ill. 225.

Appellee asks that the decree be affirmed with statutory damages of ten per centum for delay, under Sec. 23, Ch. 33, R. S., entitled "Costs," and, following *Town v. Alexander*, 85 Ill. App. 512, the court being of opinion that the appeal is prosecuted for delay, the order is that the decree be affirmed, and judgment entered against appellant in favor of appellee for five per centum on \$2,268.68, the amount found due by the decree for principal and interest, and that execution issue therefor. Affirmed with five per cent damages.

Robert W. Maxton v. H. P. Mount.

1. **DECREES**—*Part Payment Does Not Render Void*.—A voluntary and unconditional payment by a judgment debtor of a part of the judgment debt will not *per se* operate to vacate and make void the decree.

2. **SHERIFFS**—*Execution of Process by a Successor in Office*.—A

change in the office of sheriff is of no consequence; a sheriff can execute process directed to his predecessor in office.

Bill to Foreclose a Chattel Mortgage.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 4, 1900.

Statement of Facts.—In 1897 appellee filed his bill of complaint in the Circuit Court of Cook County, to foreclose a chattel mortgage to him made by appellant and his wife to secure certain notes amounting to \$390. Appellant and Nellie A. Maxton, his wife, were duly served with process and entered their appearance in said cause on June 11, 1897. On June 9, 1898, the cause was heard upon the bill of complaint, the answers of defendants and replications, and upon proofs and exhibits heard and taken in open court. On the same day a decree was entered, finding that the material allegations in the bill of complaint were true; that there was due appellee the sum of \$240, and ordering that the property described in the bill of complaint should be sold in manner stated, unless said sum was paid within ninety days from that date. It was further ordered that James Pease, the then sheriff of Cook county, execute said decree. An appeal was prayed and allowed upon filing bond in thirty days and certificate of evidence in sixty days. This appeal was never perfected, and no bond or certificate of evidence filed in compliance with said order. On December 21, 1898, a supplemental order or decree was entered in said cause under the following circumstances, to wit: On December 9, 1898, the appellant, Robert W. Maxton, by his solicitor, appeared before a judge of the Circuit Court and applied for an order restraining the sheriff from executing the decree of June 9, 1898, whereupon the appellee made a cross-motion for an order directing the sheriff to take possession of and to sell the property described in the decree of June 9th, for the balance due appellee under said decree. Affidavits were read in support of said motions, and on December 21, 1898, the court entered an order finding that since June 9th the defendants had paid to the complainant,

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on account of said decree of June 9th, the sum of \$40, and that there was still due the complainant under said decree the sum of \$200, with interest and costs, and ordering the then sheriff to take possession of and to sell the property mentioned in the decree of June 9th, to satisfy the amount due appellee. Appellant prayed and was allowed an appeal from this decree.

This cause now comes before this court upon the appeal from the decree of December 21, 1898.

ERNEST SAUNDERS, attorney for appellant.

A. MORRIS JOHNSON, attorney for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

It is contended by appellee that the decree of December 21, 1898, is erroneous because, first, the bill of complaint does not allege that the property described in the mortgage and sought to be reached by the bill to foreclose was at time of filing bill situated in Cook county, Illinois, and because neither the decree of June 9, 1898, nor that of December 21, 1898, finds that the property was so located; second, because after the entry of the decree of June 9, 1898, and before December 21, 1898, the appellant had paid \$40 to apply on the amount found due by the decree of June 9, 1898; third, because the decree of December 21, 1898, directed Ernest J. Magerstadt, then sheriff of Cook county, to take possession of the property and make sale of the same, while the decree of June 9, 1898, ordered its execution by James Pease, then sheriff of said county; and fourth, because it is claimed the effect of the entering of the decree of December 21, 1898, was to leave two independent liens, as found by the two decrees, to be enforced against the property for the satisfaction of the one debt.

There is nothing in any of these contentions which, in our opinion, merits very serious consideration. As to the first, it is enough, without discussing the necessity of the alle-

gation, to say that the bill of complaint does allege in substance and effect that the property was at the time of exhibiting the bill located in Cook county, Illinois.

As to the second, there are no facts presented which in any way tend to show that the decree of June 9, 1898, was in any way satisfied or released, except as to the extent of the payment of forty dollars thereon, and to that extent it is not enforced by the decree of December 21, 1898. There is no ground whatever for the contention that a voluntary and unconditional payment by the judgment debtor of a part of the judgment debt will *per se* operate to vacate and make void the decree.

As to the third, the change in the office of sheriff is of no consequence. Magerstadt, sheriff, could execute process directed to Pease, his predecessor in office. *Greenup v. Stoker*, 12 Ill. 24.

And as to the fourth point, the decree complained of, viz., that of December 21, 1898, in its terms provides that it and the decree of June 9, 1898, shall constitute a lien for the amount only which was found due by the decree of December 21, 1898. The decree is affirmed.

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**George F. Harding v. Frank A. Helmer, Receiver, etc.,
Charles B. Farwell et al.**

1. APPELLATE COURT PRACTICE—*Assignments of Errors and Cross-Errors Must be Written upon or Attached to the Record.*—The rules of this court require that all assignments of errors and cross-errors must be written upon or attached to the record. For non-compliance with the rule such cross-errors need not be considered.

2. CROSS-ERRORS—*To What They Can Not be Assigned.*—Cross-error can not be assigned as to the part of a decree not brought up by the appeal, or suit in error.

Appeal and Error from and to the Circuit Court of Cook County (two cases consolidated); the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 2, 1900.

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WM. J. AMMEN, attorney for appellant.

CHARLES E. POPE, attorney for Selah Reeve.

TENNEY, McCONNELL, COFFEEN & HARDING, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD delivered the opinion of the court.

This appeal and writ of error were consolidated by order entered upon the stipulation of parties and heard upon one record. They are from a decree of the Circuit Court, entered June 3, 1898, and the real questions for decision are embraced in the single proposition of whether the decree is or is not warranted by the order and opinion of the Supreme Court reversing a former decree herein, and remanding the cause "for such other and further proceedings as to law and justice shall appertain, not inconsistent with the opinion of the court" then filed. *Farwell v. Great Western Telegraph Company*, 161 Ill. 522.

The pivotal contention by appellant is directed to that part of the decree which adjudges the payment by him to the receiver of the sum of \$16,068.84, being the amount (\$14,719.50) found due by the master, with interest added to the date of the decree.

The master arrived at the amount stated by him to be due from appellant by charging appellant with \$7,622.44, and adding interest thereto from November 27, 1880, at the rate of six per cent per annum until July 1, 1891, and thereafter at the rate of five per cent per annum to the date of his report.

The said sum of \$7,622.44 is the amount which the master was directed, by the interlocutory decree entered herein, to charge appellant with and to allow interest upon from said November 27, 1880. And said \$7,622.44 is the same sum which appellant testified was the amount of certain bonds and coupons held by him on said November 27, 1880, and the exact amount received by him from the proceeds of the sale of the telegraph lines.

And for the amount received by appellant from the proceeds of such sale, the Supreme Court, by its opinion, expressly held appellant should be compelled to account, with interest from said November 27, 1880.

It is not for us to question either the reasoning or conclusion of the Supreme Court. All persons interested in the question can see the lengthy and apparently exhaustive opinion by that court upon the case, by referring to 161 Ill. 522. It seems to us that there is nothing we can add to that opinion—especially with reference to the propositions advanced by appellant.

If appellant is entitled to a set-off against the amount decreed against him, we are utterly unable, unless in disregard of the opinion of the Supreme Court, to find any warrant for it. For us to explain the opinion of the Supreme Court would be in a sense an attack upon it for want of certainty, which we are not prepared to make. It seems to us to be, in expression and necessary inference, as plain as words can be, and to fully warrant the proceedings of the Circuit Court and the decree appealed from.

We have considered every assignment of error that has been argued by appellant, and are of opinion none of them are sustainable.

A loose paper, entitled as and purporting to contain an assignment of cross-errors by Selah Reeve, one of the defendants in error, has been filed by leave of court given to assign cross-errors, and a brief has been filed in behalf of said Reeve.

The rule of this court (Rule 12) requires that all assignments of errors and cross-errors "must be written upon or attached to the record." For non-compliance with the rule these cross-errors need not be considered by us, but there is a meritorious reason also.

There is nothing in the decree now before us of which appellant complains that concerns Reeve, so far as we can see, and no error is assigned or argued against him, or as to any part of the decree in which he may, possibly, be interested. Cross-errors can not be assigned as to the part of a

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decree not brought up by the appeal, or suit in error. Walker v. Pritchard, 121 Ill. 221; Robbins v. Butler Paper Company, 35 Ill. App. 512.

The decree of the Circuit Court is affirmed.

Mr. Justice HORTON does not participate in the decision.

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Charles H. Mallory v. Mary Mallory.

1. **MORTGAGES—What Constitutes, in Equity.**—Where a purchaser of real estate delivers to his creditor his deed of the same and also executes a writing, under seal, stating in substance that he has borrowed a certain amount from him and delivered to him the deed, to be by him held in escrow, and not to be recorded till said amount should be repaid, within three years, binding himself, his heirs and assigns, so to do, such agreement, together with the warranty deed conveying the title of the premises for the purpose of securing the indebtedness, constitutes in equity a mortgage.

2. **SAME—Assignable in Equity.**—Such a mortgage is assignable in equity by indorsements on the written instrument.

3. **SAME—What is a Release.**—Where the owner of such mortgage and the debt secured by it, by a quit claim deed made by him, conveys all his interest as mortgagee in the real estate in question, such deed is in equity a release of his mortgage interest.

4. **DOWER—A Release of an Inchoate Right.**—A quit claim deed executed by the holder of a mortgage, for the purpose of releasing all his interest in the premises, is to be construed in the light of the evidence and the condition of the title at the time, and not only as a release of an inchoate right of dower.

5. **DEEDS—Construction of, etc.**—A deed is always to be construed, not only with reference to its words, but in the light of the circumstances existing at the time it was made, and the relations of the parties to the title.

Bill for Relief.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded with directions. Opinion filed December 14, 1899.

Statement by the Court.—About December 4, 1885, Catherine Mallory purchased of Fuller and others the premises

in controversy in this case, and received a warranty deed therefor to her of that date, and being indebted to William Riley in the sum of \$356.10, to secure the same, delivered to said Riley the warranty deed, and also executed a writing under seal stating in substance that she had borrowed said amount from Riley on December 4, 1885, and had delivered to him said warranty deed, to be by him held in escrow, and not to be recorded till said amount should be repaid within three years, and that she thereby agreed and bound herself, her heirs and assigns, so to do. No separate note or writing evidencing the debt to Riley was made. Neither the warranty deed nor said writing were ever recorded, and there was indorsed on the back of said sealed writing the following: "Transferred to Wm. Skakel, June 21, 1895. Wm. Riley;" also, "Transferred to Mary F. Mallory, Dec. 17, 1895. Wm. Skakel."

The premises in question were a lot and cottage of the value of \$1,500, and were occupied from the date of the warranty deed by Catherine Mallory as her homestead until the time of her death, which was January 9, 1898. Appellant was a nephew of said Catherine, lived with her for twenty-five years prior to her death, supported her, and paid all taxes and special assessments upon the property in question, amounting to about \$325, and also paid for repairs and improvements upon it, \$269.

Catherine Mallory had two sons, Michael F. Mallory, the husband of appellee, and John Mallory, neither of whom lived with their mother nor contributed to her support, though said Michael, as he testified, had plenty of money and was a money maker. July 28, 1896, said Catherine conveyed said real estate by quit claim deed to appellant, and by quit claim deed bearing the same date appellee and her husband also conveyed to appellant the same premises. In the latter deed "Michael F. Mallory and Mary F. Mallory, his wife," are named as grantors. The consideration expressed in the deed is ten dollars, but it appears that nothing was paid by appellant for the deed. Appellant testifies that the deed was made at the suggestion of Michael

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Mallory, because the latter said that he and his wife wanted to arrange that appellant have the property, and that they said they thought he was entitled to it. Appellee testified that she signed the deed willingly; "my dower right, that is all I signed away." Michael F. Mallory testified that when the deed was made he told appellant, "here is a chance, you make out an instrument and I will sign it—sign away my interest in the land there. I have plenty of money and am a money maker, and therefore I don't want anything more to do with the property." Appellant testifies that he knew of the indebtedness of Catherine Mallory to Riley, but did not know of the writing held by Riley at the time that appellee and her husband made the deed to him. Appellee testified that appellant did know of the existence of the mortgage, but her testimony shows that she only heard that he knew of it from others. She says she never presented it to appellant for payment. Michael F. Mallory testified that appellant knew of the mortgage before it was transferred to Skakel, and before his and appellant's quit claim deed to appellant, but this appellant denies.

At the time appellee and her husband made the quit claim deed to appellant, as she testified, she was the owner of the mortgage to Riley.

Appellee filed her bill, setting up said written instrument executed by Catherine Mallory to Riley, and its deposit, together with the warranty deed, with him as security, the transfer to Skakel, and appellee claiming that it was a mortgage for the indebtedness to Riley, and asking that it be declared a lien on said real estate for the amount due thereon, and in default of payment that the property be sold. Appellant answered the bill and set up, among other things, the conveyances by Catherine Mallory to him of said real estate, and also of Michael F. Mallory and appellee to appellant, and that by the latter deed appellee conveyed all her right, title and interest in said premises to appellant.

After replication the cause was referred to a master to

take proof and report his conclusions. The master reported the facts substantially as above stated, concluded that said instrument in writing from Catherine Mallory to Riley and its deposit, together with the warranty deed, with Riley, constituted a mortgage in his favor, and that the same was owned by appellee, she having received it by assignment through the indorsements thereon as above stated, and recommended a sale of the real estate for the amount found due to January 1, 1899, being \$544.48. Exceptions to the report were overruled, the report confirmed and a decree entered by the chancellor in conformity thereto. From this decree the appeal herein is taken.

FRANK H. GRAHAM, attorney for appellant.

No precise formality in making a release of the lien of a mortgage is necessary. It may be effected by a reconveyance. Release may be made of the whole or a part of the mortgaged premises by a quit claim deed from the mortgagee to the mortgagor. 2 Jones on Mort. (4th Ed.) 972.

And in it the estate of a mortgagee of land is a legal estate which passes by the same instruments of conveyance as other legal estates. Welsh v. Priest, 8 Allan (Mass.), 165.

Where land is conveyed in mortgage, and no separate obligation is given for payment of the money, a deed of quit claim of the land from the mortgagee to a stranger is sufficient to assign the mortgage and all the rights and interests under it. Dorkray v. Noble, 8 Me. 278.

The same rule applies where the debt has not been assigned. Welsh v. Phillips, 54 Ala. 309.

A conveyance by the mortgagee, by quit claim deed or otherwise, operates as an equitable assignment of the debt. Smith v. Hitchcock, 130 Mass. 570; Freeman v. McGaw, 15 Pick. (Mass.) 82; Hunt v. Hunt, 14 Pick. (Mass.) 374.

A mortgagee is considered as having a legal estate which may be alienated or transferred by any of the established modes of conveyance. Hill v. More, 40 Me. 515; Crooker v. Jewell, 31 Me. 306.

A conveyance by the mortgagee would convey all the

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right the mortgagee had in the premises, which is a conditional fee, and also operates as an equitable assignment of the mortgagee's interest in the debt. *Lawrence v. Stratton*, 6 Cush. 163.

A mortgage is not assignable at law by mere indorsement, as in the case of commercial paper, but on the other hand the estate and interest of the mortgagee may be conveyed to a third party by deed with apt words of conveyance, and the fact that it is in form an assignment makes no difference. *Barrett v. Hinckley*, 124 Ill. 45.

A conveyance by a mortgagee discharges the mortgage. *Hussey v. Hill*, 120 N. C. 312.

A formal assignment of a mortgage in law is properly made by deed which may be a separate instrument or deed of quit claim of the premises in usual form by the mortgagee to a third party, which operates as an assignment of his interest as mortgagee. 15 Am. & Eng. Enc. of Law, 843; *Dorkray v. Noble*, 8 Me. 278; *Dixfield v. Newton*, 41 Me. 221; *Weeks v. Eaton*, 15 N. H. 145.

E. S. CUMMINGS, attorney for appellee.

An equitable mortgage may be defined as a transaction which has the intent but not the form of a mortgage, and which a court of equity will enforce to the same extent as a mortgage. 11 Am. & Eng. Enc. of Law (2d Ed.), 123.

Where the language employed when read in the light of the surrounding circumstances clearly expresses an intention of charging the land with the payment of money, although the agreement may not operate as a mortgage at law, the intention of the parties will be effectuated by enforcing it as an equitable mortgage. *Peckham v. Haddock*, 36 Ill. 38.

Where the equitable owner of the land assents, in writing, that the holder of the legal title to the same may hold the title as security for the money borrowed by such owner of a third person, this will be sufficient to create an equitable lien on the land for the benefit of his creditor. *Chadwick v. Clapp*, 69 Ill. 119.

Where a mortgage has been made and no separate obligation given for the payment of the money secured by the mortgage, an assignment of the mortgage transfers all the rights and interests under it. 2 Am. & Eng. Enc. of Law (2d Ed.), 1086; 2 Jones on Mortgages (5th Ed.), Sec. 457.

If, on the face of the pleadings, no necessity appears for making the assignor a party, and it does not appear that he has any interest, an objection raised at the hearing that he is not a party will not prevail. 2 Jones on Mortgages (5th Ed.), Sec. 1375, top of page 308.

A mortgage being a mere incident to the mortgage debt, the conveyance of the mortgagee's interest in the land without foreclosure and without an assignment of the debt is considered in law a nullity and passes no title. Delano v. Bennett, 90 Ill. 533; Barrett v. Hinckley, 124 Ill. 44.

MR. JUSTICE WINDES delivered the opinion of the court.

The written instrument executed by Catherine Mallory to Riley, hereinabove set out, and its deposit with Riley, together with the warranty deed conveying the title of the premises in question to Catherine Mallory for the purpose of securing her indebtedness to Riley, constituted in equity a mortgage. Peckham v. Haddock, 36 Ill. 38; Chadwick v. Clapp, 69 Ill. 119.

This mortgage is in equity assignable, and was, by the indorsements on the written instrument set out in the statement preceding this opinion, assigned to, and the title thereto in equity was thereby vested in, appellee. 2 Jones on Mort., Sec. 457; Barrett v. Hinckley, 124 Ill. 44-6.

Appellee, being the owner of the mortgage in question, as well as the debt secured by it, there being no note or other evidence of the debt aside from the mortgage, upon the 28th day of July, 1896, by her quit claim deed of that date, voluntarily made by her, conveyed all her right and interest as mortgagee in the real estate in question to appellant. This deed was in equity a release of the mortgage interest of appellee. Dorkray v. Noble, 8 Mo. 273; Welsh v. Priest, 8 Allan (Mass.), 165; 2 Jones on Mortg. (2d Ed.)

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Sec. 972; *Waters v. Waters*, 20 Ia. 363-7; *Hussey v. Hill*, 120 N. C. 312; *Woodbury v. Aikin*, 13 Ill. 639-42; *Barrett case*, *supra*.

The contention that appellee, by her quit claim deed, only conveyed her dower, is not tenable. The owner of the fee at that time, Catherine Mallory, was living, and on the same day conveyed it to appellant. The husband of appellee had no right, title or interest in the real estate, and therefore appellee had no right of dower, inchoate or otherwise. The only right or interest which appellee had at this time was her interest as mortgagee. This interest, in the light of the evidence and the condition of the title at that time, she no doubt intended to and did effectually convey to appellant by her deed to him. A deed is always to be construed not only with reference to its words, but in the light of the circumstances existing at the time it was made and the relations of the parties to the title. *Lake Erie, etc., R. R. Co. v. Whitman*, 155 Ill. 514; *Elgin City Bkg. Co. v. Center*, 82 Ill. App. 405-12, and cases there cited.

The other contentions of counsel are not necessary to be considered. The decree of the Superior Court is reversed and the cause remanded, with directions to dismiss the bill for want of equity.

 Congress Construction Co. v. Interior Building Co.

1. **ACCOUNT STATED**—*Evidence of, Held Sufficient to Support a Verdict.*—The court reviews the evidence in regard to an account stated between the parties and holds that it is sufficient to go to the jury in support of the count on an account stated.

2. **ABSTRACT OF RECORD**—*Must Show Exceptions.*—Where the abstract of the record shows no exceptions to rulings, the objections can not be considered in this court.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

EDWIN F. ABBOTT, attorney for appellant.

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FLOWER, SMITH & MUSGRAVE, attorneys for appellee.

To establish an account stated, proof of an express promise is unnecessary. The acquiescence of the defendant in the account as rendered, and the promise to pay the balance appearing by the account to be due, may be inferred from circumstantial evidence. *Neagle v. Herbert*, 73 Ill. App. 17; *Concord Apartment House v. Alaska, etc., Co.*, 78 Ill. App. 682; *Weigle v. Brantigan*, 78 Ill. App. 285; *Bee, Executor, v. Tierney*, 58 Ill. App. 552; *Green v. Smith*, 52 Ill. App. 158; *Moran v. Gordon*, 33 Ill. App. 46; *Mackin v. O'Brien*, 33 Ill. App. 474; *McCord v. Manson*, 17 Ill. App. 121; *Bailey v. Bensley*, 87 Ill. 556; *Cochrane v. Allen*, 58 N. H. 250; *Claire v. Claire*, 10 Neb. 454; *Stebbins v. Niles*, 25 Miss. 257; *Lockwood v. Thorne*, 18 N. Y. 285; *Wiggins v. Burcham*, 10 Wallace, 129.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action of assumpsit by appellee against appellant. The declaration consisted of the common counts, including a count on an account stated. Appellant pleaded the general issue. Appellee's evidence was, in substance, that the appellee had two contracts with appellant for work, labor and material, to be done and furnished for two school buildings; that the contracts were made in the fall of 1894, and were both completed by appellee about April 16, 1895; that a statement of appellee's account with appellant, in respect to the two school buildings, showing the balance due, was submitted to Mr. Ehrhardt, appellant's president, and that the only objection to the account was to a single item of \$10, which was allowed. It further appears from the evidence that Mr. Ehrhardt claimed damages from appellee on account of another contract in respect to another building, and for that reason, also, was unwilling to pay the balance due. Evidence was introduced by the appellant tending to show that the contracts sued on were not entirely complete, and that appellant was at some expense in completing them. Appellee introduced no evidence in rebuttal of this evidence of appel-

lant. The jury found for appellee and assessed its damages at the sum of \$534.70, for which judgment was rendered.

Appellant's counsel claims that the evidence of Ehrhardt that the contracts sued on were not completed, stands uncontradicted, and therefore the verdict, which was for the full amount of the balance claimed by appellee to be due, is not sustained by the evidence. But appellee's evidence was, as previously stated, that when the account was presented to Ehrhardt, showing the balance due, he objected only to a single item of \$10, which was allowed, and did not object that the contracts, or either of them, had not been completed. It was therefore a question for the jury whether Ehrhardt's testimony that the contracts were not completed by appellant was entitled to credit, in view of the fact that he did not so claim when the account was presented to him, but made only the specific objection to the \$10 item. The evidence was, in our opinion, sufficient to go to the jury under the count on an account stated. *Neagle v. Herbert*, 73 Ill. App. 17, and cases cited.

Appellant's attorney objects that the court sustained an objection to the following question asked the witness Ehrhardt:

"Was there any unfinished work on contracts between the Interior Building Company and the Congress Construction Company at the time of the failure of the Interior Building Company?"

The objection was properly sustained. The evidence shows that there were contracts between the parties other than those sued on, and under the issues in the case damages arising out of such other contracts could neither be set off nor recouped. *De Forrest v. Oder*, 42 Ill. 500; *Kee-gan v. Kennare*, 123 Ib. 280.

Evidence offered by appellant as to the non-completion of the contracts sued on was admitted, which was all that it could legally claim.

Ehrhardt, in his cross-examination, testified that there was no memorandum in his book in reference to the McCosh school, one of the buildings in controversy, except a credit

for the contract of \$1,900. On his re-direct examination, he was asked this question :

" You say you gave them a credit for the amount of the contract; what time, with reference to the entering in of the contract, was that made on your books ? "

An objection of appellee to this question was sustained. Appellant's counsel now objects that the ruling was erroneous, but the abstract shows no exception to the ruling, and therefore the objection can not be considered. *Shields v. Brown*, 64 Ill. App. 259, and numerous cases therein cited.

We can not say that the verdict is manifestly contrary to the evidence, or that it is not warranted by the evidence.

The judgment will be affirmed.

Samuel Gillespie et al. v. Solomon Hughes.

1. *DEED—May Be Shown to Be a Mortgage.*—A deed absolute upon its face may be shown to be a mortgage by parol evidence, if such was the intention of the parties.

2. *SAME—Where a Mortgage at Common Law.*—At common law, a deed absolute in form could only be held a mortgage upon the ground of accident, fraud or mistake, but our statute permits such a deed to be held a mortgage upon another and different ground from that of fraud, accident or mistake; namely, the intention of the parties that it shall be merely a security.

3. *ACTION ON THE CASE—Where the Proper Remedy.*—The action on the case is based upon very general principles, and is designed to afford relief in all cases where one is injured by the wrongful act of another, and where no other remedy is provided. The injury may consist of the doing or omitting of some act contrary to the general obligation of the law, or some violation of a right or duty arising from the relationship of the parties.

4. *SAME—When a Conveyance is Made Without Authority.*—Where a conveyance is made without authority, by a trustee in whom the absolute title was apparently vested, to a third party without notice of the equities existing, and the owner of the equity is thereby injured, the court is inclined to the opinion that it was a wrongful act, for which an action in case may be maintained.

Action in Case.—Wrongful conveyance of property. Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge,

Gillespie v. Hughes.

presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed December 14, 1899.

Statement.—On the 5th of May, 1894, appellants were officers in the Suburban Lumber Company, the Elsmere Lumber Company and the Farson & Libbey Company, corporations engaged in the business of selling lumber and other materials in the city of Chicago, and appellee was a plastering contractor doing business in the said city. Prior to the 5th day of May, 1894, appellee had become indebted in various amounts to the Suburban Lumber Company and the Elsmere Lumber Company for materials furnished to him by these corporations, and the amount of such indebtedness was stated by appellee to be about \$1,300. Prior to the 5th day of May, 1894, appellant Gillespie, on behalf of these corporations, had called upon appellee several times and endeavored to collect a part of this indebtedness due from him, but appellee was unable to pay anything; and on one of these visits by Gillespie to appellee, prior to the 5th day of May, appellee proposed to Gillespie that he would turn over to him a certain piece of real estate to be held as security for the payment of this indebtedness.

Accordingly, on the said 5th day of May, R. B. Farson, one of the appellants, called upon appellee, Hughes, with his attorney, and appellee, joined by his wife, executed a warranty deed to Gillespie, and conveyed to Gillespie the real estate here in question, "subject to two trust deeds securing notes aggregating \$6,000." At the same time a writing was drawn up as follows:

"This agreement, made this fifth day of May, A. D. 1894, between Solomon Hughes, party of the first part, and Samuel Gillespie, party of the second part, witnesseth:

"That whereas, the said party of the first part is indebted to the Suburban Lumber Company and the Elsmere Lumber Company in a certain sum, not to exceed the sum of two thousand dollars, and whereas, he has conveyed to said party of the second part, as security for said indebtedness, lot 25 in block 8, in Johnston & Cox's subdivision in S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ in Sec. 36, T. 40 N., Range 13, in Cook county, Illinois.

"Now, therefore, the said Samuel Gillespie, party of the second part, does hereby agree that he will reconvey the above real estate to said Solomon Hughes, a party of the first part, or to any person said Hughes may designate, at any time within two years from this date, upon the payment to him of not to exceed two thousand dollars and interest on said sum from said date at six per cent per annum, provided said reconveyance shall be made by said Gillespie upon the payment to him, or the Suburban Lumber Company and the Elsmere Lumber Company of whatever indebtedness then exists from said Hughes to said Suburban Lumber Company and to said Elsmere Lumber Company at the time said reconveyance is requested by said Hughes.

"This contract shall be held in escrow for the benefit of the parties hereto by Mr. C. P. Johnson.

"In witness whereof, said parties have hereunto set their hands the day and date first above written.

(Signed) "SAMUEL GILLESPIE,
"By R. B. Farson.
"SOLOMON HUGHES."

This agreement was not under seal. After the deed and agreement had been executed, the deed was delivered by appellee to Farson, and the agreement was placed by the parties in the hands of C. P. Johnson, to be held in escrow.

After these papers were executed Gillespie took possession of the property and placed it in the hands of an agent to collect and receive the rents.

About a week after the date of this instrument Hughes gave notes to Gillespie to the amount of the indebtedness then owing by him to these corporations, and the notes were afterward, at maturity, renewed from time to time, by substituting other notes for them, until the three notes dated respectively October 18, 1895, November 1, 1895, and December 4, 1895, were given. These notes were never, in any manner, taken up by Hughes, and at the time this suit was brought, on the 7th day of May, 1896, Hughes was still indebted thereon in an amount aggregating nearly \$1,900. Appellee never tendered payment or demanded a deed from Gillespie or Farson, and he never paid or offered to pay any taxes upon the property after it was turned over

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to Gillespie, or any interest upon the incumbrances existing at that time. He admitted upon the trial that he had never been able, since the property was turned over, and up to the time of the trial, to pay the indebtedness which he owed at the time the deed was made.

On December 1, 1895, the Farson & Libbey Company, to whose order two of these notes referred to were made payable, made a voluntary assignment in the County Court; and voluntary assignments were also filed the same day by the other two corporations, the Suburban Lumber Company and the Elsmere Lumber Company. Prior to the time when these assignments were made, all of the notes had passed into the hands of different banks, and judgments against Hughes were subsequently entered upon each of them, which are still wholly unpaid and unsatisfied, except to the extent of a ten per cent dividend paid by the Farson & Libbey Company.

On November 12th, Farson, on behalf of some one of these corporations, applied to Albert H. Kleinecke for some accommodation notes which could be used at banks, and Kleinecke being unwilling to sign such notes without security, it was proposed that Gillespie convey to Kleinecke, as security, the property which had been deeded to him by Hughes as security for the payment of these notes. Kleinecke was willing to take the conveyance of the property as security for the liability which he might incur by reason of the accommodation notes, and on November 12, 1894, a deed of the property from Gillespie to Kleinecke was made. Before this deed was made, Kleinecke was notified that Gillespie merely held the title to said property in trust to secure an indebtedness, and that it was expected that the former owners of the property would redeem, and Kleinecke was therefore requested not to place the deed on record. Accordingly the deed to Kleinecke was withheld from the record until December 31, 1895, after the assignments of these several corporations.

During the period which intervened between the execution of the deed to Kleinecke and the time when the same

was placed on record, Gillespie continued to remain in possession of the property, collecting the rents, and no effort whatever was made by Kleinecke to take possession of the property until after the failure of these corporations. Kleinecke then notified the agent in charge of the property that it had been conveyed to him; but the agent continued collecting the rents as formerly. After Kleinecke's deed was placed on record he paid the taxes on the property, interest on the incumbrances, and repairs, amounting to \$630 in excess of what he received during the same period of time out of the income of the property.

About November 10, 1896, Albert H. Kleinecke made a conveyance of the property to his brother, William C. Kleinecke, a non-resident, and the deed was placed on record November 12, 1896. Before the transfer by Kleinecke to his brother, he saw his brother at Worcester, Mass., and told him something of the circumstances with reference to the property. It was agreed that Albert H. Kleinecke should continue to look after the premises and collect the rents, etc. After his return home he executed the deed, placed it on record, and after receiving it from the recorder's office sent it to his brother. The same agent still continued in charge of the property collecting the rents.

It also appeared, and was not controverted, that a bill is now pending for a foreclosure of the incumbrance on the property at the time of the conveyance to Gillespie; and that the income of the property, after this conveyance, was never at any time sufficient to meet the fixed charges.

The declaration consists of five counts. The fifth count alleges, in effect, that the plaintiff caused to be conveyed to Gillespie certain land, worth \$12,000, to be held as security for certain money to be paid by the plaintiff to certain corporations, amounting to about \$1,800; yet the defendants wrongfully, etc., conveyed the said property "to a stranger without notice;" that said Gillespie only held said lands and real estate as security for payment as aforesaid, whereby property was lost, etc.

Upon the trial plaintiff offered in evidence the original

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deed by which he had acquired title to the property in question. He then offered in evidence the conveyance from plaintiff to Gillespie, and then offered in evidence the so-called defeasance agreement, before set out. This agreement was objected to by counsel for defendants for the reason that it was not under seal, upon the ground that in a court of law an instrument under seal, like the deed to Gillespie, can not be changed or varied, and its express terms and provisions abrogated, by a parol agreement or an agreement not under seal. The objection was overruled by the court, and the agreement was admitted in evidence. The conveyance by Gillespie to A. H. Kleinecke, and from the latter to W. C. Kleinecke, were shown. Evidence as to value of the property was presented.

At the close of the plaintiff's case, counsel for defendants requested the court to instruct the jury to return a verdict for the defendants, and presented to the court an instruction in writing to that effect; but the court refused to give the instruction, and marked it refused. Counsel for defendants then moved the court to instruct the jury to return a verdict for the plaintiff, but for mere nominal damages, and presented a written instruction to that effect, but the court refused to give the instruction and marked it refused.

And again, at the close of all the proof, and before the argument to the jury, the court was again requested to give the two instructions mentioned, which the court declined to do, and marked the instructions refused.

The jury returned a verdict for the plaintiff and assessed his damages at \$2,000. From judgment thereon this appeal is prosecuted.

C. T. FARSON and C. W. GREENFIELD, attorneys for appellants.

The doctrine is firmly established in this State that "once a mortgage always a mortgage." The absolute deed being once established as a mortgage, therefore the conveyance to another with notice will not affect the character of the transaction. The equity of redemption of the mort-

gagor is not thereby cut off. *Miller v. Thomas*, 14 Ill. 428; *Wynkoop v. Cowing*, 21 Ill. 570; *Tillson v. Moulton*, 23 Ill. 648; *Brown v. Gaffney*, 28 Ill. 149; *Reigard v. McNeil*, 38 Ill. 400; *Smith v. Cremer*, 71 Ill. 185; *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67; *Bearss v. Ford*, 108 Ill. 16.

Where the grantee in a deed absolute, but which is in fact a mortgage, conveys or assigns to a third person, who takes with notice of the equitable rights of the mortgagor, the grantee or assignee becomes but a mortgagee, and the rights of the mortgagor are not affected. *Brown v. Gaffney*, 28 Ill. 149; *Shaver v. Woodward*, 28 Ill. 277; *Reigard v. McNeil*, 38 Ill. 400; *Smith v. Knoebel*, 82 Ill. 392; *Strong v. Shea*, 83 Ill. 575; *Union Mutual Life Ins. Co. v. Slee*, 123 Ill. 57, 93.

A purchaser of trust property, even without notice of the trust, has no title as against the *cestui que trust*, unless he has paid the purchase money. *Carpenter v. Davis*, 72 Ill. 14.

A purchaser of trust property with notice himself becomes a trustee, and is bound to perform the trust the same as the original trustee. *Bethel v. Sharp*, 25 Ill. 173.

H. B. JACKSON, attorney for appellee.

It is provided by statute "that every deed conveying real estate, which shall appear to have been intended only as security in the nature of a mortgage, though it be an absolute conveyance in form, shall be considered as a mortgage." Chapter 95, Section 12, R. S.

Under this statute the Supreme Court has frequently decided that "such a deed, absolute in form, if intended as security, will be held both at law and in equity a mortgage." *Tilson v. Moulton et al.*, 23 Ill. 648-656; *German Insurance Co. v. Gibe*, 162 Ill. 251-256, and cases there cited; *Frankenthal v. Mayer*, 54 Ill. App. 160.

It is one of the boasts, and a maxim of the common law, that "there is no wrong without a remedy." This maxim has been considered so valuable that it gave occasion to the invention of this very form of action, called an action on the case. *Broom's Legal Maxims*, 191.

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For illustration of this maxim see *Van Pelt v. McGraw*, 4 Com. 110. Here the court say:

"The action on the case is based upon very general principles, and is designed to afford relief in all cases where one man is injured by the wrongful act of another, where no other remedy is provided. This injury may result from some breach of positive law, or some violation of a 'right or duty' growing out of the relations existing between the parties. It forms no objection to this action that the circumstances are novel; that no case precisely similar in all respects has previously arisen." *Van Pelt v. McGraw*, 4 Com. 110; 1 Cowen's Treatise, 3.

In 1 Chitty's Pleadings, pages 132-133, the author clearly points out the ground on which our action on the case is sustained. He says:

"Torts of this nature are to the absolute or relative rights of persons, or to personal property in possession or reversion, or to 'real property,' corporeal or incorporeal, in possession or reversion.

"These injuries may be either by non-feasance, or the omission of some act which the defendants ought to perform, or misfeasance, being the improper performance of some act which might lawfully be done; or by 'malfeasance,' the doing what the defendant ought not to do; and these respective torts are commonly the performance or omission of some act contrary to the general obligation of the law, or the particular rights or duties of the parties, or of some implied or expressed 'contract' between them."

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The questions presented upon this appeal are: First, whether the court erred in admitting parol evidence to establish that the deed absolute in form was intended by the parties as a mortgage to secure a debt; secondly, whether the conveyance by Gillespie to Kleinecke was a wrong for which an action will lie; and, thirdly, if an action will lie, whether a recovery of substantial damages, or anything more than nominal damages, can be sustained upon the evidence here.

Upon the first question it is contended by counsel for

appellants that it was error to admit parol evidence to show that this deed absolute in form was intended by the parties to be a mortgage only. It is urged that while parol evidence is admissible in a suit in equity for the purpose of thus showing that a deed absolute in form was in fact intended by the parties to be a mortgage, yet in a court of law the strict rule obtains that the deed can not be thus varied in its terms by parol evidence. The contention is not tenable. The law is well settled in this State to the contrary. *The German Ins. Co. v. Gibe*, 162 Ill. 251.

In this case Mr. Justice Wilkin, speaking for the court, said :

“It has also been held that the fact that it was intended as a security merely, may be proven by parol; nor is this rule confined to causes in equity, as contended by counsel for defendant. No good reason can be offered for holding such testimony competent in equity and not in an action at law like this. The reason such testimony is not competent in an action of ejectment is, that there the title is directly in issue, and the legal title prevails. The statute expressly makes the question whether an absolute deed is a mortgage depend upon the intention of the parties. * * * If, as at common law, a deed absolute in form could only be held a mortgage upon the ground of accident, fraud or mistake, there would be much reason for holding, as is done by other courts, that the fact could only be proven in a court of equity, where such matters are cognizable; but our statute permits a deed absolute in form to be held a mortgage upon another and different ground from that of fraud, accident or mistake, namely, the intention of the parties that it shall be merely a security. No good reason can be shown for holding that intention may not be proved in an action at law, where the title is not directly in issue.”

The second question is as to whether the conveyance by Gillespie to Kleinecke was a wrong for which an action will lie. If the conveyance was made without authority by the trustee, in whom the absolute title was apparently vested, to a third party without notice of the equities of the appellee, and appellee was thereby injured, we are inclined to the opinion that it was a wrongful act for which an action might be maintained by the appellee.

The action on the case is based upon very general principles, and is designed to afford relief in all cases where one is injured by the wrongful act of another and where no other remedy is provided. The injury may consist of the doing or omitting of some act contrary to the general obligation of the law, or some violation of a right or duty arising from the relationship of the parties. 1 Chitty Pl. 132; Van Pelt v. McGraw, 4 Comst. 110.

In *Himes v. Keighblinger*, 14 Ill. 469, the declaration counted upon a wrongful recording of a deed which had been delivered by the plaintiff to the defendant to be held in escrow, by means of which wrongful recording the plaintiff was injured. The court held that an action on the case would lie for such wrongful act resulting in an injury, and said :

“He did a wrongful act, which resulted in a damage to the plaintiff, and for that damage he must be held liable.”

It is practically conceded in this case that the action is properly brought, for each party requested instructions upon the measure of damages, the appellants asking that the court instruct the jury that only nominal damages could be recovered.

The third question presented is upon the question of substantial damages. The damages recoverable, beyond mere nominal damages, can only be such as the appellee has actually sustained. The evidence discloses that A. H. Kleinecke took the title with notice of rights of appellee. The evidence is not clear as to just what notice or knowledge of the facts W. C. Kleinecke had when he took the title.

We can not say that there appears from the evidence any sufficient showing that appellee has been damnified to the extent of \$2,000, which is the amount of the recovery by him. Without a showing to the effect that his substantial damages amount to the sum recovered, the judgment ought not to be sustained. It might well be, for all that appears in the record, that W. C. Kleinecke took the title with full knowledge of the appellee's right to redeem, and that,

upon a tender by appellee to him of the amount due, to secure which the deed was given, Kleinecke would carry out the trust to which Gillespie was obligated and reconvey the premises to appellee.

It is impossible to determine from this record that W. C. Kleinecke would or could claim the land as a *bona fide* purchaser, without notice of the trust, and relying upon the record title. See *Carpenter v. Davis*, 72 Ill. 14.

We are of opinion that before appellee can sustain a recovery of substantial damages he must show substantial injury.

Other questions raised need not be considered by reason of the conclusion reached.

The judgment is reversed and the cause is remanded.

John C. Robinson v. Louis R. Nessel.

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1. EVIDENCE—*Tending to Contradict a Written Agreement—When Oral Testimony is Competent.*—Oral evidence tending to show that an alleged written contract was never intended to be operative between the parties, and that it never in fact had a legal existence—that its sole and only purpose was to overcome certain objections of a trades union—that it was not to be acted upon by the parties to it, and that in truth and in fact the real contract was an oral agreement, is competent.

Assumpsit for wages. Trial in the Circuit Court of Cook County; on appeal from a justice of the peace; the Hon. JOHN C. GARVER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed December 14, 1899.

W. A. SHERIDAN, attorney for appellant.

No appearance by appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellee recovered a judgment in a justice court from which appellant appealed to the Circuit Court of Cook

County, where a trial before the court and a jury resulted in a verdict in favor of appellee and against appellant for \$93.65, on which a judgment was rendered, from which this appeal is taken.

Suit was brought for services by appellee for appellant, rendered pursuant to a certain sealed written contract of apprenticeship between appellee and appellant, dated July 1, 1892, by which appellee was bound to appellant as an apprentice in the trade of masonry for the term of three years, to wit, from the date of the contract to July 1, 1895, appellant agreeing thereby to pay appellee for the first year's services \$200, for the second year \$350, and for the third year \$500. Appellee claimed for work done in and prior to July, 1894, at which time he ceased to work. It is conceded by appellant that the evidence shows a *prima facie* case in favor of appellee, but that there was error in the exclusion of evidence by the court.

Appellant, in the course of his defense, while on the stand, through his counsel, offered evidence tending to show that the contract of apprenticeship between appellee and appellant, which was the basis of appellee's action and under which he testified that he rendered the services for which the suit was brought, was never in force, and was not in fact the contract under which such services were rendered, was intended only for exhibition to the Bricklayers' Union, and that the real contract entered into between appellant and appellee, under which the services sued for were rendered, was an oral contract, by which appellee was to work for \$1 a day the first year and \$1.50 a day the second year, and that appellee was paid in full for all services which he rendered to appellant. The learned trial judge, however, refused to admit the evidence so offered, except as to the amount paid, apparently upon the theory that the written contract of apprenticeship was the real and only contract between the parties, and that any evidence which tended to show that such contract was never intended to be and never was in force between the parties, was incompetent, for the reason that it was an attempt to vary a written contract by parol.

This ruling of the trial judge was, in our opinion, erroneous. The offered evidence was not for the purpose of varying or contradicting the terms of the written contract sued on, but tended to show that the alleged written contract was never intended to be operative between the parties, and that it never in fact had a legal existence; that its sole and only purpose was to overcome certain objections of the Bricklayers' Union; that it was not to be acted upon by the parties to it, and that in truth and in fact the real contract under which appellee worked for appellant was an oral agreement, by which appellee was to be and was paid by the day a higher rate of wages than that provided by the written agreement, but the hiring was by the day. 1 Greenleaf's Evid., Secs. 284, 302 and 303; 2 Wharton's Evid., Sec. 927, and notes; 2 Jones on Evid., Secs. 444, 447 and 448; Dauchy Iron Works v. Toles, 76 Ill. App. 669, and cases there cited; Brewster v. Reel, 74 Ia. 506; Perry, Jr., v. C. Southern C. Rd. Co., 5 Cold. (Tenn.), 136-145.

In the Brewster case, *supra*, it was held that evidence was competent in a suit on a written agreement which tended to show "that the instrument never in fact had a legal existence."

In the Perry case, *supra*, the court recognizes the rule that parol contemporaneous evidence is not admissible to contradict or vary the terms of a valid written agreement, but that the rule was not infringed by the introduction of parol evidence which showed that the "instrument never had a legal existence or binding force."

The evidence was also admissible as tending to show a waiver of the written agreement or a discharge of the parties from its terms. This court, in the Dauchy Iron Works case, *supra*, Mr. Justice Sears, speaking for the court, in reference to a discharge or release of a condition of a contract under seal, said: "The well established rule is that such a release may be by parol." See also Worrell v. Forsyth, 141 Ill. 22; and Moses v. Loomis, 156 Ill. 392.

For the error in excluding the offered evidence, the judgment is reversed and the cause remanded.

Mathilda Benson Gates v. David Gilmour.

1. *PRACTICE—Of Bringing Suits in Remote Parts of the County.*—The practice of bringing suits by plaintiffs residing in Chicago against other residents of Chicago before justices of the peace having their offices in remote parts of the county is not of itself sufficient ground for reversing a judgment, but it is sufficient to make a court of review very ready to reverse for error apparent in the record.

2. *EVIDENCE—What is Proper for Purpose of Impeachment.*—It is proper for purposes of impeachment to show that a witness has, at a time and place specified, testified in contradiction to the testimony given upon the trial in question.

Assumpsit.—Trial in the County Court of Cook County, on appeal from a justice of the peace; the Hon. E. B. GOWER, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed December 14, 1899.

C. S. O'MEARA, attorney for appellant.

DAVID GILMOUR, attorney for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

This is an appeal from a judgment of the County Court upon an appeal to that court from a judgment of a justice of the peace. The litigants reside in Chicago. Appellee has brought three suits for the claim in question before justices of the peace. The first two were dismissed. The third was brought before a magistrate having his office in Melrose, some ten miles from Chicago. The defendant (appellant) did not attend the trial there, and a judgment was obtained against her for \$40. Upon appeal by her, a verdict and judgment were obtained against her in the County Court for \$68.

The practice of bringing suits by plaintiffs residing in Chicago against other residents of Chicago before justices of the peace having their offices in remote parts of the county, is scandalous. The fact that this practice was

followed in this case is not of itself sufficient ground for reversing the judgment appealed from; but it is sufficient to make a court of review very ready to reverse for error apparent in the record. Appellee took judgment for \$40 only, before the justice of the peace, when appellant did not appear. Upon the trial in the County Court he testified to charges for services amounting to \$142. Upon his cross-examination he was asked by appellant's counsel if he did not testify before the justice of the peace at Melrose that appellant was indebted to him in the sum of \$40. Upon objection to this question the trial court excluded answer thereto, and appellant preserved her exception to that ruling. The ruling was erroneous. It is proper for purpose of impeachment to show that a witness has, at a time and place specified, testified in contradiction to the testimony given upon the trial in question. *Pressly v. Powers*, 82 Ill. 125; *Aneals v. The People*, 134 Ill. 401; *C. C. Ry. Co. v. McLaughlin*, 146 Ill. 353; *The C. Ry. Co. v. Allmon*, 147 Ill. 471; *A., T. & S. F. R. R. Co. v. Feehan*, 149 Ill. 302.

In this case it would be competent as an admission. *Chase v. Debolt*, 7 Ill. 371; *Wheat v. Summers*, 13 Ill. App. 444, and authorities therein cited.

For error in excluding this testimony the judgment is reversed and the cause is remanded.

William C. Hickox and Irving B. Hickox, doing business under the name of W. C. Hickox & Co., v. Lazarus Fels, Joseph Fels and Samuel S. Fels, doing business under the name of Fels & Co.

1. ATTORNEYS—*Can Not Withdraw from a Case Without his Client's Consent.*—An attorney can not legally withdraw from a case without the consent of his client, and the consent of the court.

2. RATIFICATION—*Tantamount to Prior Authority.*—It is immaterial whether a contract was authorized prior to its execution or subsequently

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ratified. If a contracting party could authorize it in the first instance, he could ratify it subsequently.

3. *GUARANTY—Acceptance May be Inferred.*—It is not necessary that there should be a formal express acceptance of a guaranty, such acceptance may be inferred.

4. *SAME—Notice of Acceptance May be Inferred.*—Notice of acceptance of a guaranty need not be proved to have been given in writing, or in any particular form, but may be inferred by the jury from facts and circumstances which will warrant such an inference.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

F. H. GANSBERGEN, attorney for appellants.

Where there is a mere proposal by one to guarantee the performance of the undertaking by another, if credit be extended to such other the contract of guaranty is not complete until credit is extended and notice given of the acceptance of the guaranty. *Ruffner v. Love*, 33 Ill. App. 601.

PECK, MILLER & STARR, attorneys for appellees.

Notice of the acceptance of a guaranty need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from the facts and circumstances which shall warrant such inference. *Kirchoff v. Union Mutual Ins. Co.*, 33 Ill. App. 607; *Powell v. Chicago Carpet Co.*, 22 Ill. App. 409.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action of assumpsit by appellees against appellants on an alleged guaranty. The declaration consists of the special counts and two common counts for goods sold and delivered. The defendants pleaded the general issue only. The jury found the issues for appellees and assessed their damages at the sum of \$664.15, and judgment was rendered on the verdict.

Appellants William C. Hickox and Irving B. Hickox, partners under the firm name of Hickox & Co., were engaged in the commission business in the city of Chicago.

William C. Hickox was also the president of the Hickox & Read Publishing Co., a corporation which published and circulated a Spanish paper in Spanish-speaking countries, which paper purported to represent manufacturers who desired to introduce their goods into such countries. Appellees were soap manufacturers in Philadelphia and partners under the firm name of Fels & Co.

Appellees put in evidence the following document:

"It is agreed by and between Fels & Co., of Philadelphia, Pennsylvania, party of the first part, and Hickox & Read Publishing Company, party of the second part, to wit:

"That party of the first part will furnish, say \$100 worth of toilet soap manufactured by them, said goods to be forwarded to South America by party of the second part and there used by salesmen of the party of the second part as they deem most advisable for the purpose of making sales and establishing business connections for party of the first part.

"Said goods to be charged to party of the second part and paid for unless orders for \$500 worth of goods are sent in and paid for before the expiration of this agreement.

"All orders of goods to be sent to the party of the first part through W. C. Hickox & Co., Chicago, Illinois, and due payment of same is guaranteed by W. C. Hickox & Co.

"The party of the first part further agrees to allow the party of the second part five (5) per cent commission on all orders when accepted by the party of the first part and settled for by the purchaser.

"This agreement to continue for the term of six (6) months, renewable if satisfactory at the option of both parties for a further term.

"All expenses in connection with the work above mentioned shall be borne by said party of the second part, and in no event shall the party of the first part be liable for any amount other than hereinbefore mentioned.

"FELS & Co.

"HICKOX & READ PUBLISHING Co.,

"W. B. Donnell,

"Secretary."

It will be observed that the foregoing agreement is without date, but it is shown by evidence, which will hereafter be referred to, that it was executed December 16, 1892.

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Appellees received the following letter:

"CHICAGO, Dec. 19th, 1892.

"MESSRS. FELS & Co.,

"1151 North 3rd St., Philadelphia, Pa.

"GENTLEMEN: We are in receipt of an agreement made with our Mr. Donnell by which you are to furnish at once \$100 worth of toilet soap to be sent to Valparaiso as samples of your goods. We also note we are to sell \$500 worth of your goods on or before the expiration of this agreement, which is six months from date, all orders to be guaranteed by W. C. Hickox & Co. If we are to be held responsible for the selling of \$500 worth of your goods, the samples must be shipped us promptly so as to give our agents a chance to take orders; otherwise it would be impossible for us to comply with the terms of the contract. The S. S. 'Barden Tower,' we learn takes on our goods until at least the 24th inst., therefore the goods should be in New York before that time without fail. Do not fail to mark the goods as per instructions given you by Mr. Donnell and number the cases from one up, sending us invoice in duplicate and the R. R. receipt or bill of lading to Messrs. Hemenway & Browne, our forwarding agents in New York." * * *

"HICKOX & READ PUBLISHING CO.,

"W. C. Hickox,

"Pres. & Treas."

Subsequently the following letter was written by appellees to appellants:

"DECEMBER 21, 1892.

"MESSRS. W. C. HICKOX & Co.,

1223 Monadnock Block, Chicago, Ill.

"GENTLEMEN: We enclose invoice and duplicate of shipment of sample lot of soaps to Valparaiso, Chili, per shipping memorandum sent herewith. We have notified Messrs. Hemenway & Browne that the amount of the invoice would be practically \$100.

"The arrangement for forwarding these goods was made with Mr. Donnell, of the Hickox & Read Publishing Co., and the understanding was that you were to guarantee the bills.

Yours very truly,

"FELS & Co."

Appellees received an answer to the last letter which, omitting unimportant matter, is as follows:

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"CHICAGO, Dec. 23, 1892.

"MESSRS. FELS & Co.,

1151 3rd Street, Philadelphia, Pa.

"GENTLEMEN: Yours of the 21st, enclosing invoice in duplicate for sample lot of soaps for Valparaiso, Chili, received, and everything seems to be in order.

"All orders sent you, either through Hickox & Read Publishing Co., or through W. C. Hickox & Co., will be guaranteed by us.

"HICKOX & READ PUB. CO.,

"W. C. HICKOX,

"Pres. & Treas."

Appellees' letter having been addressed and mailed to W. C. Hickox & Co., the legal presumption is that it was received by that firm, and it would naturally be expected that it would be answered by and in the name of that firm, instead of in the name of the Hickox & Read Publishing Co. That it was received and answered by a member of the firm of W. C. Hickox & Co. is shown by the testimony of W. C. Hickox, who testified that any letters signed W. C. Hickox, as president, were written or dictated by him. February 24, 1893, appellants wrote to appellees the following letter:

"MESSRS. FELS & Co.,

1151-1161 N. 3rd Street, Philadelphia.

"GENTLEMEN: We have your statement of the 24th inst., in which you say the account is past due, and that you will draw on us the 4th of the month unless we remit before. We think your bookkeeper has overlooked the contract in regard to this matter, as same is not due until the 16th of June, as per terms of contract. Therefore you will please make correction on your books, and oblige

"Yours very truly,

"W. C. HICKOX & Co."

June 16, 1893, appellees again wrote to W. C. Hickox & Co., inclosing statement of account for the sample soaps, and informing appellants that they had drawn on them for the amount of the account, at one day's sight. Appellees received an answer, under date of June 20, 1893, saying:

"We did not accept your draft in payment of samples shipped to Valparaiso, for the reason that by our last mail our agents informed us that they had established an agency,

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and had received an order for goods, amounting to more than he \$500 stipulated in the contract." * * *

"They anticipate prosperous times, and we have no doubt you will receive your share of orders from that country. The order will reach us by next mail, which should be here in the next few days."

Although appellees' letter was addressed to W. C. Hickox & Co., the answer to it is signed "Hickox & Read Pub. Co., W. C. Hickox, Pres. & Treas."

J. Parker Read, vice-president of the Hickox & Read Publishing Co., received from T. Elliott Rourke, of Valparaiso, Chili, an order of date May 19, 1893, for certain specified quantities of different kinds of soaps, of the value of \$503.76. This order is headed, "Order No. 2800, from J. Parker Read. Valparaiso, Chili, May 19, 1893. For Fels & Co., Philadelphia, Pa. Mark T. E. R. 2800, Valparaiso, Chili." This order was enclosed in a letter from Read, of date May 30, 1898, the latter being addressed, "Messrs. Fels & Co., Philadelphia, Pa.," but the letter was sent, with its enclosure, to the appellants, Hickox & Co.

The order enclosed in Read's letter of May 30th contained instructions as to packing, and stated terms as follows: "Terms sixty days sight." Appellants having received Read's letter enclosing the order, wrote to appellees as follows:

"CHICAGO, July 1st, 1893.

"MESSRS. FELS & Co., 1151 N. 3d St., Philadelphia, Pa.

"GENTLEMEN: We have the pleasure of handing you enclosed an order received from T. Elliott Rourke, of Valparaiso, Chili, to which we referred some days ago. If these goods can go forward in the next few days, they will be in time for the S. S. 'Coya,' which is now advertised to sail about the 15th inst., and as this order calls by direct steamer, the chances are there will be no other steamer for some time.

"Do not fail to comply with this request in regard to boxing and shipping and make draft as he suggests. The law of that country requires that the gross weight of each box be marked in kilos, figuring two and one-fifth pounds per kilo, and all cases numbered from one up, letting invoice, which should be in duplicate, show same. * * *

"Very truly yours,

"W. C. HICKOX & Co."

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July 7, 1893, appellants again wrote to appellees acknowledging receipt of a letter from appellees of date July 5, 1893, to the effect that appellees would be able to fill the order of T. Elliott Rourke, and expressing satisfaction with the same.

Under date of August 16, 1893, appellants, W. C. Hickox & Co., wrote to appellees as follows:

"You notified us that your goods would be in time for the S. S. 'Coya.' Did you succeed in getting the goods off? If so, kindly render us with a copy of your invoice, that we may place the same on file for future reference. We require this on all shipments when payment is guaranteed by us.

"Yours truly,

"W. C. HICKOX & Co."

In response, the following letter was sent by appellees to appellants:

"Aug. 18th, 1893.

"MESSRS. W. C. HICKOX & Co., Chicago, Ill.

"GENTLEMEN: In response to your favor of the 16th inst. we are herewith enclosing you duplicate invoice for goods shipped by us from here July 8th, to go forward on steamship 'Coya' from New York on July 15th. We find that the goods went by the 'Coya' as originally intended, and awaiting your further favors, we are

"Yours very truly,

"FELS & Co."

The last letter, which was directed to W. C. Hickox & Co., was answered as follows:

"CHICAGO, Aug. 29, 1893.

"MESSRS. FELS & Co., 1151 N. 3rd St., Philadelphia, Pa.

"GENTLEMEN: We are in receipt of yours of the 18th inclosing duplicate invoice of goods shipped to T. Elliott Rourke, Valparaiso, Chili.

"These goods you say you found went forward on the S. S. 'Coya,' as originally intended. This shows by your bill of lading, we suppose, forwarded you by your agents in New York.

"Trusting this shipment will be the means of future orders, we remain

"Yours very truly,

"HICKOX & READ PUB. Co.,

"W. C. Hickox,

"Pres. & Treas."

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Appellees received a letter from J. Parker Read, vice-president of the Hickox & Read Publishing Co., of date August 23, 1893, acknowledging the receipt of the bill of lading of the goods shipped on Rourke's order. The goods were shipped July 8, 1893, and a draft for the amount of the bill, \$526.07, was drawn by appellees July 12, 1893, on their bankers, chargeable to the account of T. Elliott Rourke, which, by Rourke's instructions, was sent to Banco De Valparaiso and was accepted by Rourke August 29, 1893, but never paid, and after several months was returned to appellees. December 13, 1893, Read wrote to appellees, informing them that Rourke had not been able to meet the draft, but would remit within a few weeks. Appellees, on receiving Read's letter, wrote to appellants under date of January 23, 1894, informing them of Read's letter, and saying: "This account was guaranteed by your house, and we must ask that you send us a check for it." The appellants answered as follows:

"CHICAGO, Jan. 26th, 1894.

"MESSRS. FELS & Co., Philadelphia, Pa.

"GENTLEMEN: We are in receipt of yours of the 23rd inst., and in reference to the goods shipped to T. Elliott Rourke under our guarantee. In reply would say, that if the draft is not paid, it should be returned with the invoice and B. L. to which it was attached and which controls the goods. The papers attached to the draft go with the draft. If Mr. Rourke pays the draft he is entitled to the B. L. controlling the goods, we guaranteeing payment of draft. Return the draft with papers attached and we will take up the same as per our guaranty. If the bank has not returned the papers we will take it for granted that your bankers believe Mr. Rourke will pay the draft, otherwise they should have returned same to you, the same as you send out a draft in this country; if it is not paid, it should be returned. Exchange in that country is very bad, and that undoubtedly is the cause of the goods being left in the Custom House. Their money has been so reduced that it is worth only twenty-five cents on the dollar; therefore hard for him to dispose of the goods; but as we have said, if he does not pay the draft, return same to us with papers attached and we will take up the same.

"Trusting that he will not keep you waiting much longer, we remain

"Very truly yours,

"W. C. HICKOX & Co."

In letters written by appellants to appellees of dates, respectively, February 1st and February 14, 1894, appellants admit the guaranty. In the former letter they say: "Now, we guaranteed the payment of that draft, which was a sixty day sight draft;" in the latter letter they use the words, "under our guaranty." There was other correspondence between the parties, which we deem it unnecessary to refer to in this place. The bill for the goods shipped on Rourke's order has never been paid.

Appellants object that the deposition of Samuel S. Fels should have been suppressed for the alleged reason that no notice was given of the proposed taking of the deposition, as prescribed by the statute. The statute requires that ten days notice shall be given to the adverse party or his attorney. E. A. Sherburne was the attorney of record for appellants, and filed for them a plea of the general issue. The record shows, and appellant W. C. Hickox, in his affidavit in support of appellants' motion to suppress the deposition, says that Sherburne continued to be appellants' attorney from January 18, 1898, until May 27, 1898, when H. Gansbergen was substituted for Sherburne by leave of the court. The record shows that such substitution occurred at the last mentioned date. The notice was served on Mr. Sherburne January 19, 1898, by exhibiting to him the original notice and giving him a copy thereof. No objection is made to the form or substance of the notice. Mr. Sherburne, when the notice was served on him, wrote on the back of it these words: "I am not the attorney of the defendant any longer. Mr. James Frake is the attorney for defendant." Thus Mr. Sherburne attempted to withdraw from the case without the consent of his clients, as shown by the affidavit of W. C. Hickox, and without the consent of the court, as shown by the record. This he could not legally do. *United States v. Curry*, 6 Howard, 106; *Mumford v. Murray*, 1 Hopkins, 369; *C. P. Stock Exchange v. McClaghry*, 50 Ill. App. 358.

After service made on Sherburne, appellees' attorneys, out of abundant caution, served the notice on Mr. Frake, who was not the attorney of record, and who W. C. Hickox swears was not authorized to accept service for appellants.

The motion to suppress the deposition of Samuel S. Fels was properly overruled.

The remaining contentions of appellants' counsel are, that there is no evidence that Donnell had authority to contract for appellants; that the contract shows a mere offer of guaranty, and there is no evidence that it was accepted, and that the contract had expired before Rourke's order was forwarded to appellees. We are of opinion that the evidence is ample to support a finding that the contract was authorized by appellants, and that the guaranty was accepted, relied on and acted on by appellees. Appellees, in their letter of December 21, 1893, enclosing to appellants the invoice of the sample soaps, say: "The arrangement for forwarding these goods was made with Mr. Donnell, of the Hickox & Read Publishing Co., and the understanding was that you were to guarantee the bills." This letter was addressed to and received by Hickox & Co. December 23, 1892, Hickox & Co. answered appellees' letter, saying: "All orders sent you, either through the Hickox & Read Pub. Co. or W. C. Hickox & Co., will be guaranteed by us." This letter was signed "Hickox & Read Pub. Co., W. C. Hickox, Pres. & Treas.," but the evidence of W. C. Hickox is that it was signed by him and either written or dictated by him.

We have pointed out other instances in which Hickox & Co. signed answers to letters addressed to them, in the name of "Hickox & Read Pub. Co." Indeed the business of the firm of Hickox & Co. and that of the Hickox & Read Publishing Co. seems to have been so closely identified that it was regarded by appellants as a matter of indifference whether letters were written by them in their firm name or in the name of the Hickox & Read Publishing Co. That company seems to have been appellants' agent to procure orders on manufacturers on which, when filled and paid for,

appellants could obtain commissions. The answer of December 23d to appellees' letter of December 21st, not only does not question the authority of Donnell to contract for appellants, but, as we think, recognizes it. But it is immaterial whether the contract was authorized prior to its execution or subsequently ratified. If appellants could authorize it in the first instance, which they clearly could, they could ratify it, and the evidence is abundant that they ratified it. In questioning the guaranty, appellants' counsel goes further than do appellants themselves. They do not deny the guaranty. The following occurred in the examination of appellant W. C. Hickox:

Q. "How did you come to be writing this Fels & Co. about this bill or promising to pay it?"

A. "In regard to promising to pay it?"

Q. "Yes." A. "Why, there was the correspondence—we sent them an order, and if they had followed our instructions, any goods that were not paid for, we would take up the draft with bill of lading attached."

Q. "Will you deny guaranteeing the bill?" A. "We denied we guaranteed the bill unless they shipped according to the instructions or rules for shipping to that country. Now we guaranteed any goods that went to South America, and draft attached to bill of lading. If the draft was not paid, they were at liberty to return the draft and bill of lading to us and we would pay the bill, and reimburse ourselves from the goods themselves."

There is no evidence that any such instructions as referred to by the witness were given to appellees. The evidence is that appellees followed all instructions given them. It is not necessary that there should be a formal express acceptance of a guaranty. In *Reynolds v. Douglas*, 12 Peters, 497, 504, cited with approval in *Ruffner v. Love*, 33 Ill. App. 601, the court, speaking of notice of acceptance of a guaranty, say:

"This notice need not be proved to have been given in writing, or in any particular form, but may be inferred by the jury from facts and circumstances which will warrant such inference."

We think it clear that appellants, as business men, must

have known from appellees' letter of December 21, 1892, enclosing invoice of goods shipped under the contract, and expressly stating the understanding was that appellants were to guarantee the bills, that the guaranty was accepted and relied on by appellees. If appellees did not accept and rely on the guaranty, why did they enclose the bill of the goods to the appellants, and demand payment of it?

From the letter of December 21, 1892, acceptance of the guaranty may reasonably be inferred. The contention that Rourke's order was not within the contract is untenable. The language of the contract is:

"All orders of goods to be sent to the party of the first part through W. C. Hickox & Co., Chicago, Illinois, and due payment of same is guaranteed by W. C. Hickox & Co."
* * * "This agreement to continue for the term of six months, renewable if satisfactory, at the option of both parties, for a further time."

The agreement is not dated, but both parties fix the date of its execution as December 16, 1892. Appellee Samuel S. Fels so fixes it by referring to the time of the first shipment of goods, and also by the letter of December 19, 1892. Appellants fix it by their letter of February 24, 1893, in answer to a letter from appellees, demanding payment for the sample soap. In that letter appellants write:

"We think your bookkeeper has overlooked the contract in regard to this matter, as same is not due until the 16th of June, as per terms of contract."

The part of the contract in relation to the sample soaps referred to in appellants' letter is:

"Said goods to be charged to party of the second part and paid for, unless orders for \$500 worth of goods are sent in and paid for before the expiration of this agreement."

By the terms of the agreement it was to expire in six months. Appellants' letter, therefore, notified appellees, in substance, that it could not be determined before June 16th, whether appellants would be liable for the \$100 worth of sample soaps, thus fixing June 16, 1893, as the date of the expiration of the contract, which date is just six months from December 16, 1892. Rourke's order is dated May 19,

1893, and it was enclosed to appellants in a letter from Read to them of date May 30, 1893, to be by appellants forwarded to appellees. The order was sent by appellants to appellees, enclosed in a letter of appellants of date July 1, 1893, in which letter appellants urge speedy shipment of the goods ordered, and request appellees to comply with directions as to boxing and shipping. July 7, 1893, appellants again wrote to appellees, acknowledging receipt of a letter from them of date July 5, 1893, to the effect that the order would be filled and the goods shipped as indicated in appellants' letter of July 1st, and saying they were glad to learn this. August 16, 1893, appellants wrote to appellees, asking them if they had succeeded in shipping the goods, and, if so, requesting a copy of the invoice, saying, "We require this on all shipments guaranteed by us."

Appellees, August 18, 1893, sent to appellants a copy of the invoice as requested. Thus both parties, appellants and appellees, treated Rourke's order as within the contract of December 16, 1892, and within appellants' guaranty. In this we think they were correct. The order, as before stated, was dated May 19, 1893. Read was then in Chili, and it is a reasonable presumption that the order was given to him by Rourke the day of its date. At any rate, Read had it in his possession May 30th, so that it was given within the term of the contract. If the contract had been that the order should be by mailed letter, then the instant that a letter, enclosing the order to appellees, was mailed, would be the date of giving the order; it would be deemed given when mailed. 1 Parsons on Contracts, 483, *et sequens*.

But the contract was that it should come to appellees through Hickox & Co., and it was delivered by Rourke to Read, who, we think, must, in view of the evidence, be regarded as appellants' agent in Chili, on or before May 30, 1893. It was thus made and delivered to appellants within the time fixed by the contract. Appellants, instead of the mail, being the medium of delivery of the order to appellees, when the order was delivered to appellants, by delivery to their agent, it was, as in the case of a letter mailed,

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an order on appellees at the time of such delivery, and sent to appellees within the meaning of the agreement of December 16, 1892.

Counsel for appellants object to certain questions of the court to W. C. Hickox, a witness for appellants. The abstract shows no exceptions to such questions, which is sufficient to dispose of the objection.

The judgment will be affirmed.

Paul Andryczka v. The Towarzystwo, etc.

1. **INSTRUCTIONS**—*When Not Reversible Error*.—The giving of an instruction which might have been worded with more technical accuracy, if the court can not say that the jury were misled by it, is not reversible error.

2. **APPELLATE COURT PRACTICE**—*Abstracts Must Contain Bonds Referred to in Instructions*.—Where a bond referred to in an instruction is not set out in the abstract, the court can not pass upon an objection to the instruction.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 4, 1900.

JOHN C. TRAINOR, attorney for appellant.

WILLIAM A. DOYLE, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This was an action by appellant to recover damages alleged to have occurred by reason of the failure of appellee to renew an insurance policy insuring appellant in the sum of \$700 against loss by fire, the property so insured having been destroyed by fire after the expiration of the time for which it was insured.

The declaration, after averring that a loan was about to be made by defendant to plaintiff, avers, in substance, that the defendant, "by Alfred Wilkoshesky, its duly authorized

agent, notary public and attorney, demanded of the plaintiff that he surrender and deliver, with proper consent and indorsement of said insurance company, said insurance policy to the defendant as additional security for the loan aforesaid;" that plaintiff objected, stating that the policy would soon expire and that he wanted, himself, to attend at the expiration thereof to getting out a new policy; but defendant, "by its duly authorized agent," insisted on the delivery to it of the policy, and assured plaintiff that, at the expiration thereof, it would have it renewed, or take out a new policy in another company, etc., without any further care, anxiety or notice on the part of plaintiff, and that plaintiff, relying on said assurances, complied with defendant's request; that the policy expired April 18, 1894, at noon of said day; that the defendant did not renew the same nor take out a new policy, and that the insured property was destroyed by fire June 15, 1894, to the damage of plaintiff, \$1,500.

The jury found for appellee, and judgment was rendered on the verdict. The defendant did not renew the policy or procure another, and the insured property was destroyed by fire after the expiration of the policy.

The main contest on the trial was as to whether Wilkoshesky was authorized by appellee to agree that appellee would have the policy renewed, and as to whether Wilkoshesky did in fact so agree. Appellant testified substantially as averred in the declaration, and that he delivered the policy to Wilkoshesky at his, appellant's, house. Wilkoshesky testified that he did not receive the policy from appellant; that he had no conversation with him about it; that the first he knew of it, he found it in a bundle of papers handed to him by appellee's president; that when he went to appellant's house, he went to procure the signature and acknowledgment of appellant and his wife to a mortgage, to secure the proposed loan. Charles Koski, appellee's president, testified that he handed to Wilkoshesky, for the purpose of examination by him, certain papers which had been brought by the appellant to the association, and that he, the wit-

ness, had not seen the papers thereafter till at the trial, and that he did not open the papers, or know what they were, before handing them to Wilkoshesky.

There can be no question that the jury were warranted by the evidence in finding for the appellee, and the contrary is not contended; but appellant's counsel objects to each and all of the instructions, which are as follows:

First. "In this case the burden of proof is on the plaintiff, and, unless the evidence preponderates in behalf of plaintiff, then he can not recover. In no event can he recover more than \$700. Before the plaintiff can recover, he must prove by a preponderance of the evidence that the defendant, by an agent, authorized so to do, agreed to renew the \$700 policy for the plaintiff, and failed to do so, and that the property described in such policy was lost by fire."

Second. "By law it was not the duty of defendant to renew such policy. The defendant could only be made liable by its agreement to renew, and the burden of proof is on the plaintiff to show that the defendant did agree to renew the \$700 policy."

Third. "In this case plaintiff has called as witnesses certain officers or agents of the company, and, by calling them, vouches for their credibility, and plaintiff can not discredit their testimony by impeaching their testimony. But he may show by evidence what the facts are."

Fourth. "The court instructs the jury that any statements in the board of directors by any individual that the company ought to pay the loss is not binding on the company and should not be considered by the jury."

Fifth. "The court further instructs you that the bond read in evidence was admitted by the court to show the relation of the witness Andryczka to the loan association—and for no other purpose."

Sixth. "It is not shown here that the association could recover the loss, if it paid it, of the notary, and you should disregard all arguments or statements of counsel to that effect, or that tend to discredit the witnesses called by him."

The objections to instruction one, are that it contains nothing on the subject of ratification of Wilkoshesky's agency; that it specifies \$700 as the amount of policy, and that it is misleading in telling the jury that unless Wilkoshesky had authority to bind the defendant at the time of

the agreement, plaintiff could not recover. The declaration avers that Wilkoshesky was the appellee's authorized agent at the time of the alleged agreement; the instruction properly is that it was incumbent on appellant to prove that allegation. There is no evidence of ratification by the appellee corporation; but if it be conceded that there was such evidence, the effect of the instruction would not be, as counsel assumes, to exclude such evidence from the jury, because the ratification of an act is not only equivalent to authority prior to the performance of the act, but is evidence of such authority. The reference to the policy by the words, "agreed to renew the \$700 policy," is merely descriptive of the policy and corresponds with appellant's declaration. The specific objection to the mention of a \$700 policy is that the jury might understand that the damages were limited to that amount, whereas there was evidence tending to prove that the loss exceeded that sum, but appellant's counsel, in his address to the jury, expressly asked for a verdict for \$700.

We perceive no sound objection to the second instruction. The third instruction is criticised as misleading. The first part of the instruction evidently means that appellant could not directly attack the veracity of a witness called by himself, while the last clause of the instruction is to the effect that appellant might show the actual facts by any other witness, and so would not be bound by the testimony of the former witness. The instruction might have been worded with more technical accuracy, but we can not say that the jury might have been misled by it, or that the giving of it is reversible error. The fourth instruction states the law. The bond referred to in the fifth instruction is not set out in the abstract, nor is there any abstract of it. Therefore we can not pass on the objection to the instruction. Counsel for appellant, in his argument to the jury, stated in substance that Wilkoshesky would be liable to appellee on his \$5,000 bond for any neglect, in case a verdict should be rendered against appellee. It not appearing from the abstract what the conditions of the bond are, we can not tell what

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Wilkoshesky's liability would be in the event of a verdict against appellee, and it must be presumed that the trial judge who saw the bond and its conditions, and whose province it was to construe it, correctly construed it, and that it did not impose any liability on Wilkoshesky in the contingency of a verdict against appellee.

We are of opinion from the evidence that if a new trial were ordered the verdict would be the same. The judgment will be affirmed.

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1. APPELLATE COURT PRACTICE—*Duty of Counsel to Aid the Court.*—Courts are entitled to a conscientious and earnest effort on the part of counsel to aid them in the decision of cases, and it can not be said that this duty is performed in a matter so important as is the case at bar, in which the liberty of a citizen is involved, when counsel do not by their briefs discuss the law or cite a single authority on the questions raised.

2. CONTEMPT—*Erroneous Order of Commitment.*—An order of court committing a person to jail for contempt, in refusing to obey a decree which does not give the person committed the right to purge himself by the performance of the decree, is erroneous.

3. SAME—*Punishment to be Specifically Defined.*—The punishment inflicted upon a person for a contempt, in refusing to obey a decree of court, should be clearly and specifically defined by the order inflicting it.

Attachment for Contempt.—Appeal from the Circuit Court of Cook County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed January 4, 1900.

ELMER BISHOP, attorney for appellant.

FREDERICK S. BAKER, attorney for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

The Circuit Court of Cook County, in the case of Preis v. Billingsley, the appellant here, on June 20, 1898, after a hearing upon the master's report and evidence of the par-

ties, entered a decree finding in substance that appellant was indebted to Preis for money loaned, to secure which he delivered to the latter certain whisky, which was afterward, though wrongfully and fraudulently, replevied by Billingsley and in his possession at the time of the appointment of the receiver in that case; that on January 4, 1898, an injunction in the case was served upon appellant restraining him from selling or disposing of the whisky; that after the service of the writ of injunction upon him, appellant had the whisky in his possession and control, and that the receiver made a demand upon appellant to turn over to the former the whisky; but appellant failed and refused to comply with such demand, and the court therefore decreed that the injunction be made perpetual; that appellant turn over to the receiver the said whisky within two days from the entry of the decree; that within five days appellant pay to said Preis the amount due to him, including costs, amounting to \$400.75, and that upon payment of that amount that the receiver surrender said whisky to appellant without further order of the court. From this decree appellant appeals to this court, but the appeal was dismissed for failure on his part to perfect the appeal in accordance with the statute.

Subsequently proceedings for contempt were instituted in the cause against appellant for failure to comply with the decree of June 20, 1898, which, after a full hearing, resulted in an order as follows :

“ Ordered that the said Billingsley be committed to the common jail of Cook county, Illinois, there to remain until he shall have complied with the order and decree of this court, entered herein on the 20th day of June, A. D. 1898, requiring him to turn over to receiver herein the said goods mentioned in said decree, to-wit, thirty-five cases of Belle of Bourbon whisky and one barrel of Belle of Bourbon whisky. Further ordered that warrant of commitment issue for that purpose and that sheriff of said county be and he is hereby directed to take him, the said Billingsley, into his custody forthwith, and discharge him from custody when he, the said Billingsley, shall have complied with the terms of this order.”

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From this order the appeal herein is taken.

It appears from the record of the proceedings for contempt against appellant, that the court granted time to appellant on several occasions to enable him to comply with its decree directing him to pay the amount found to be due, but that he failed and refused to pay the same, or any part thereof; and it appears from his answer to the rule upon him to show cause why he should not be attached for contempt, that he had no money or property with which to satisfy said decree, and that prior to the appointment of the receiver he had disposed of said whisky and had not had the same in his possession since the filing of the original bill.

It is contended that the order of commitment is vague and indefinite as to the term of imprisonment, and that appellant should thereby have had the alternative of satisfying the decree by the payment of money, as was his right under the original decree.

The briefs and arguments of counsel on both sides are of no aid to the court beyond mere statements as to what is shown by the record. Not a single authority is cited in either. Such gross dereliction of duty on the part of counsel can not be too severely condemned. Courts are entitled always to a conscientious and earnest effort on the part of counsel to aid them in the decision of cases, and it can not be said that this duty is performed in a matter so important as is the case at bar, in which the liberty of a citizen is involved, when counsel do not by their briefs discuss the law or cite a single authority on the questions raised.

We are inclined to the opinion that the order committing appellant is erroneous, first, in that the term of imprisonment inflicted is indefinite, and second, in not giving appellant the right to purge himself by the payment of the amount found to be due. Even though the whisky in question was in the possession and control of appellant after the service of the writ of injunction upon him, as found by the court, it may be true that appellant had placed it entirely beyond his power to comply with the order, by disposing of the

whisky previous to the time of the order of commitment, and that he justly merited a severe punishment for such conduct; but such punishment should be clearly and specifically defined by the order inflicting it. It is not definite as to time, when he is committed until he should turn over the whisky. He may not be able to do that for many reasons which might be assigned. It nowhere appears from the record that the whisky was in appellant's possession, power or control at the time the order was entered. If it was not, the imprisonment might be, under the terms of the order, for the term of appellant's natural life.

It also seems unreasonable and unjust to make the contempt order narrower than the original decree, which provides that appellant should be entitled to the property in question upon the payment of the money found due in the decree. The contempt is a civil contempt, and to enforce obedience to the decree of the court, which would be as well and satisfactorily complied with by the payment of the money to secure which the property was pledged by appellant. At the time the order of commitment was entered, it is true appellant showed that he had no money with which to pay, nor property from which could be made, the amount he was directed by the decree to pay, but the next day, or even before he could be lodged in prison, he might be able to get the money to pay. It seems oppressive that he should not be allowed this privilege in order to avoid imprisonment.

From such examination of the questions involved as we have been able to make, we think our view as to the indefinite nature of the order is sustained by the precedents. *People v. Pirfenbrink*, 96 Ill. 68; *Berkson v. The People*, 51 Ill. App. 109; *Clark v. Parker*, 70 Ill. App. 234; *Kyle v. People*, 72 Ill. App. 181; *Solomon v. Holdom*, 72 Ill. App. 351; *Rapalje on Contempt*, Sec. 137; *Howard v. The People*, 3 Mich. 208; *Gurney v. Tufts*, 37 Me. 135; *People v. Markam*, 7 Calif., 209.

In the *Pirfenbrink* case, *supra*, which was habeas corpus, it was held that an order committing the relator to the

county jail until the further order of the court for contempt in refusing to obey an order of the court to turn over certain books, was void. The court said that if the committal had been for a definite period, or until he should perform a specified act, then the judgment would have been capable of being reviewed on error; also that judgments of this kind "must be such as the defendant may readily understand and be capable of performing."

In the Berkson case, *supra*, an order of commitment which found that the relator had in his possession, at the time the order was entered, a certain sum of money which it was his duty to turn over to the receiver in the case, was held to be definite and certain, and was affirmed.

In the Kyle case, *supra*, this court, in speaking of an order which fined the relator, for contempt, the sum of \$250, directed him to pay the same, and in default of payment that he be imprisoned for sixty days, and until discharged by due process of law.

Mr. Justice Adams, delivering the opinion, said :

"The judgment in such case, after the words '\$250,' should be that the defendant be committed to jail, there to remain until the fine and costs are fully paid or he be discharged according to law, or words of like import," and held that on the judgment as rendered, relator would have had to remain in jail sixty days, even though willing to pay his fine the next day after commitment, and in addition would be liable for the amount of the fine.

In the section above cited from Rapalje, the author says that it should appear from an order of commitment for contempt "that it was in the defendant's power to perform the required act, or else the commitment will be void."

In the Markam case, *supra*, which was a commitment until a certain fine was paid, it was held "the judgment should have specified the term of imprisonment."

In the Howard case, *supra*, a judgment that the defendant pay a fine and stand committed until the same was paid, was held erroneous because the term of imprisonment was indefinite.

We are of opinion that the order here in question, in addition to the commitment until the appellant turn over the whisky, should also have provided that he could be released upon the payment by him of the money which the original decree provided he could pay, and then be entitled to the possession of the whisky, and should have the further disjunctive clause, "or he be discharged according to law," or words of like import.

Because the order is indefinite and unreasonable in the respects indicated, the judgment is reversed and the cause remanded.

Rudolf J. Krause and Erwin F. Breyer v. Walter Scott.

1. **EQUITY PRACTICE—A Bill to Prevent a Multiplicity of Suits.**—The court holds that the suit at bar can not be maintained as a bill of peace or bill to prevent a multiplicity of suits, upon the facts alleged in the amended bill of complaint. (See copy of amended bill, *post*.)

2. **SET-OFF—Damages Resulting from a Breach of Warranty.**—Damages, such as may result from a breach of a warranty of the quality of articles sold, may be set off in a suit for the purchase price of the articles, but not upon the ground of equitable set-off in a suit to prevent a multiplicity of suits.

Bill of Peace.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 4, 1900.

COPY OF AMENDED BILL OF COMPLAINT.

"And your orators further show that said defendant is a resident of the State of New Jersey, and is not a resident of the State of Illinois, and is not within the jurisdiction of the courts of Illinois, and is not amenable to the process of said courts, so that your orators can not maintain a suit against him therein; that any money which your orators may be compelled to pay to said defendant will be removed from said State of Illinois to said State of New Jersey, and beyond the reach of an execution upon any judgment which your orators may obtain against him; that said defendant has no property in the State of Illinois and within the jurisdiction of the courts of said State from which your orator

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can make any judgment they may obtain against him; that your orators are not indebted to said defendant in any sum whatever; that the consideration for said notes hereinbefore mentioned has wholly failed and said notes are null and void; that your orators ought not to be harassed and annoyed by and put to the trouble and expense of defending themselves against the suits already brought and the many suits threatened against them, as aforesaid.

And your orators further show that they have returned to said defendant the two printing presses received by them from him as aforesaid, in as good condition as they were when so received, and that said defendant now has the same; that said defendant can sell and dispose of said printing presses for a large sum of money, and upon information they state that he has already disposed of them; that upon information derived from said defendant they state the fact to be that after charging against your orators all moneys paid out by said defendant on account of said two printing presses and said contract with your orators, and all damages claimed to have been sustained by him by reason thereof, a large part of which can not be properly charged against them, the total loss or damage claimed to have been sustained by said defendant does not exceed the sum of twelve hundred dollars (\$1,200); and your orators charge the fact to be that it is very much less; while said defendant has in his possession and claims the right to recover upon the notes of your orators as aforesaid, amounting to forty-two hundred dollars (\$4,200) and interest thereon, or three thousand dollars (\$3,000) in excess of the total damages claimed by said defendant; that at the same time your orators are without remedy against said defendant for the damages sustained by them, amounting to more than three thousand dollars (\$3,000), except in the courts of the State of New Jersey, whereby they are without complete and adequate remedy at law."

Statement.—The bill of complaint by which this suit was begun sets up the following facts: Appellants bought certain machines of appellee and in payment therefor executed certain promissory notes. That appellee guaranteed that such machines should be capable of turning out a certain amount of work in a given time. That the machines delivered to appellants were not such as were provided for and not capable of the work specified by the terms of the

guaranty. That by reason thereof the machines were returned to and accepted by appellee. That by reason of breach of the contract by appellee appellants have sustained damages. That appellee has begun suits against appellants upon the promissory notes given on account of payment for the machines; that one of such suits was begun and is pending in the Circuit Court of Cook County, Illinois; and that two of such suits are pending in courts of justices of the peace in said county. That other suits upon other of the promissory notes are threatened by appellee. Alleges that appellants have no adequate remedy in law. Prays that appellee be enjoined from prosecuting the suits at law, and in effect that the court set off the damages sustained by appellants against the claims of appellee upon the notes. By amendment to the bill of complaint it is alleged that appellee is a resident of the State of New Jersey and not amenable to process of the courts of this jurisdiction.

Upon general demurrer by appellee to the amended bill of complaint, the court below, sustaining the demurrer, dismissed the bill for want of equity.

From that decree this appeal is prosecuted.

F. H. CULVER, attorney for appellants.

JAMES F. HUTCHISON and JACOB DIAMOND, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

Upon the facts alleged the amended bill of complaint can not be maintained as a bill of peace or bill to prevent a multiplicity of suits. *C. P. S. Exchange v. McClaughrey*, 148 Ill. 372; *Commissioners v. Green*, 156 Ill. 504; *Jones v. The Chester Co.*, 17 Ill. App. 111; *Cleland v. Campbell*, 78 Ill. App. 624; 1 High on Inj., Secs. 61-62.

Nor can it be maintained upon the ground of equitable set-off. The only claim of set-off presented by the allegations of the bill is such as might result from a breach of

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warranty of the quality of the articles sold. In a suit for the purchase price of the articles this claim can be set off. *Babcock v. Frice*, 18 Ill. 420.

It is not alleged that appellee is insolvent. There was, therefore, an adequate remedy at law, and there is no ground for the intervention of relief in equity. The non-residence of appellee is unimportant, for he had, by beginning the suit in the Circuit Court of Cook County, brought himself within the reach of appellants in this behalf.

In that suit brought by appellee against appellants to recover on the promissory notes given for purchase price, appellants may plead their claim of set-off, arising by reason of the breach of the warranty of the machines, and thereby obtain full relief in law.

The learned trial judge properly sustained the demurrer. The decree is affirmed.

Lord, Storey & Co. v. William D. Hollis and John A. Duncan, Copartners, etc.

1. **JUDGMENT**—*When it Should Not be Reversed.*—If from an inspection of the whole record it appears that substantial justice has been done between the parties, the judgment should not be reversed, even though it should be conceded that the form of an instruction is objectionable.

Assumpsit, on an account stated. Trial in the County Court of Cook County, on appeal from a justice of the peace; the Hon. D. L. JONES, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

DOW, WALKER & WALKER, attorneys for appellant.

STEWART K. JEWELL, attorney for appellees.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellees and against appellant for the sum of \$23.75, rendered in the

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County Court, on appeal from a judgment of a justice of the peace.

John K. Abbott, a salesman for appellees, testified that, August 23, 1893, he received an order from John G. Hoffman, secretary and treasurer of the appellant corporation, for goods to the amount of \$23.75; that Hoffman requested him to date the bill September 1, 1898, so as to permit him, Hoffman, to obtain a discount by paying the bill within ten days from said date, which he, Abbott, did; that after thirty days from September 1, 1898, he called on Hoffman and requested payment for the goods, and that Hoffman told him that the goods had been delivered and that he would pay for them, but that he had a note to meet and wanted a few days more time, but would pay the bill in a week or ten days; that in ten days the witness called again on Hoffman and told him that unless payment should be made by six o'clock that evening suit would be brought; that suit was subsequently brought, after which witness saw Hoffman at the office of Mr. Duncan, one of the appellees, and that Hoffman then said he would pay all except the costs.

Appellee Duncan testified that the only interview he had with Hoffman in respect to the bill, was after the commencement of the suit before the justice, and that Hoffman then said he wanted to pay for the goods, but not the costs.

Hoffman, on behalf of appellant, testified that he did not tell Abbott that the goods had been delivered; that he did not know whether or not they had been delivered; also, that he told Duncan that rather than have any litigation about the matter, he would be willing to pay the net amount of the claim, but not any costs. The evidence is that the amount of the costs was only \$3, which is the sole amount really in controversy between the parties. *Hinc illae lachrymae.*

The giving of the following instruction is assigned as error:

"The court instructs the jury as a matter of law, that if they find, from all the evidence in the case, that the defendant in this case promised to pay to the plaintiffs in this case

the sum of \$23.75 for goods delivered to it from said plaintiffs, then the jury shall find the issue for the plaintiff."

The contention of counsel is, that the court, by this instruction, assumed that the goods were delivered, and so took the question of delivery from the jury. We do not so think. The testimony of Abbott was that Hoffman said that the goods were delivered and, at the same time, promised to pay for them. Assuming this testimony to be true, Hoffman's promise, which, in view of his official position, must be regarded as appellant's promise, was a promise to pay for goods delivered. But even though it should be conceded that the form of the instruction is objectionable, yet, if, from an inspection of the whole record, it appears that substantial justice has been done between the parties, the judgment should not be reversed. *Newkirk v. Cone*, 18 Ill. 449; *Dishon v. Schorr*, 19 Ib. 59; *Schwarz v. Schwarz*, 26 Ib. 81; *N. C. City Ry. Co. v. Lake View*, 105 Ib. 207, 214; *Heckle v. Grewe*, 125 Ib. 58, 63.

We are satisfied from such inspection that justice has been done, and that if there should be another trial the result must be the same. Hoffman, while denying that he told Abbott that the goods had been delivered, did not deny their delivery, nor that he promised Abbott to pay for them, and he admits that he told Duncan that he was willing to pay the claim, less the costs in the justice's court. Now, although it may be true, as he says, that he had no personal knowledge as to whether or not the goods were delivered, yet it is not reasonably presumable that he would have promised to pay for them had he not been credibly informed that they were delivered. Appellant, as a business corporation, must have known whether or not the goods were delivered. Proof of their non-delivery would have been a complete defense, yet it did not even attempt to prove non-delivery.

We think it the duty of counsel to discourage, as much as possible, litigation in such cases as this, which, for aught we know, may have been unavailingly done in the present case.

The judgment will be affirmed.

Gertrude S. Walker v. Jacob L. Kesner et al.

1. PLEADING—*In Covenant*.—A declaration in covenant which fails to allege that the defendant entered into a covenant is bad.

2. SAME—*Liability in*.—The tendency of our courts is toward a greater liberality in matters of pleading, in order that substantial justice may be speedily done; but they have not as yet so far departed from the common law rules of pleading as to permit a recovery in covenant under a declaration which sets up a breach of implied warranty or a tort.

3. COVENANT—*Where the Action Will Not Lie*.—Where a person has not engaged by deed to perform a covenant, the action will not lie against him.

Covenant.—Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

Statement.—Appellant, as lessor, demised premises to "The Boulevard Phoenix Club" as lessee, by a written lease. The lease was signed as follows, after the signature of the lessor: "The Boulevard Phoenix Club, by Milton A. Strauss, Pres.; Arthur Stein, Secretary. For rent due upon this lease, appellant brought this suit against Milton A. Strauss, Arthur Stein and fifteen others as co-defendants in an action of covenant. Each count of the declaration alleged that these defendants, "pretending to be directors, officers and agents of 'The Boulevard Club,' did assume to exercise corporate powers and to use the name of a pretended corporation without having theretofore complied with an act of the State of Illinois entitled, 'An Act Concerning Corporations,' being part of Chapter 32, Revised Statutes of the State of Illinois, which prescribes and regulates the manner and means in and by which corporations may be lawfully organized and authorized to do business;" each count sets out a failure to file in the office of the recorder of deeds of Cook county, in which county was located the principal place of business of said pretended corporation, a certificate from the Secretary

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of State of the State of Illinois, of the complete organization of such corporation; each count alleges that "so assuming and pretending as aforesaid, the defendants did lease by indenture of lease from the plaintiff," etc.; and each count makes the written lease a part of the count. The defendants interposed demurrers to each count of the declaration. The trial judge sustained the demurrers as to each count, and, appellant electing to stand by her declaration, a judgment was entered against her for the costs, from which judgment this appeal is prosecuted.

CHARLES F. DAVIES and JOHN B. BRADY, attorneys for appellant.

FELSENTHAL, D'ANCONA & FOREMAN, attorneys for Jacob L. Kesner and Siegfried H. Kirchberger, appellees.

JULIAN W. MACK, attorney for Modie J. Spiegel, Milton A. Strauss and Albert L. Strauss, appellees.

A. BINSWANGER and ELMER E. JACKSON, attorneys for Oscar G. Foreman, Benjamin Hillman, Sidney Lowenstein, et al., appellees.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

Without discussing appellant's possible right of recovery against appellees in another form of action upon the facts disclosed by the declaration, it is enough to say that it appears from the declaration, and from each count thereof, that appellees did not enter into any covenant whatever with appellant, and hence that the declaration in covenant was bad. Here the defendant has not engaged by deed to perform the covenants, and consequently covenant will not lie. *Butnett v. Lynch*, 5 Barn. & C. 589; *Moore v. House*, 64 Ill. 162; *R. R. I. & St. L. R. R. v. Beckemeier*, 72 Ill. 267; *Hancock v. Yunker*, 83 Ill. 208; *Neufeld v. Beidler*, 37 Ill. App. 34; *McCormick v. Seeberger*, 73 Ill. App. 87; *Seeberger v. McCormick*, 178 Ill. 404; *Murphy v. Kohlsaat*, 68 Ill. App. 579.

The learned trial judge properly sustained the demurrers.

The tendency of the courts may be toward a greater liberality in matters of pleading in order that substantial justice may be speedily done, but our courts have not as yet so far departed from common law rules of pleading as to permit a recovery in covenant under a declaration which sets up a breach of implied warranty or a tort.

Our statute of amendments is broad and liberal and is liberally interpreted. There was nothing to prevent a curing of the error in pleading after the demurrers had been sustained.

The judgment is affirmed.

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John J. Knickerbocker et al., Trustees, v. Joseph P. Crosby.

1. APPELLATE COURT PRACTICE—*Objections Not Covered by Assignment of Errors.*—Objections not covered by assignments of error can not be considered in this court.

2. RES ADJUDICATA—*What May be Considered as.*—The court compares this case with that of Knickerbocker v. McKindley, 172 Ill. 535, and holds the latter *res adjudicata* on this appeal.

Intervening Petition.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

Statement by the Court.—This was a proceeding in the court below by petition of appellee to compel the payment by appellants, trustees under the last will and testament of James J. Gore, deceased, for certain vegetables, of the value of \$385.40, which were furnished to one Laughlin, receiver appointed for the partnership property of the firm of Gore & Heffron, and while said receiver was operating a hotel, part of the partnership estate, pursuant to the order of the court appointing him.

The order appointing said Laughlin receiver was entered on July 16, 1889, was made upon the motion of said Gore, the then complainant in the case, the defendant Heffron consenting thereto, and, among other things, authorized him to "conduct the business of keeping said hotel, and from the receipts thereof pay such sums as may be necessary to discharge the current obligations incurred by him in the management thereof." Laughlin continued to conduct said hotel as receiver until December 6, 1894, and continued to act as receiver until January 31, 1895, when he resigned. March 15, 1894, the hotel building was sold to appellants, the then complainants in the bill, substituted as such after the death of Gore, for \$95,000, and also the furniture and fixtures therein, being part of the partnership estate, for the sum of \$9,250, which sale was affirmed March 28, 1894, by an order of that date which directed the receiver to turn over said furniture and fixtures to appellants. From this order Heffron appealed to this court, pending which appeal the furniture and fixtures were left in the possession of the receiver, as it is alleged, by the consent of appellants, which they deny. The receiver continued to conduct the hotel until December 6, 1894, when, upon petition of appellants, he was directed by order of the court to lease it, including said furniture and fixtures in the lease, which was done. One Tabor, on the resignation of Laughlin, was appointed receiver and continued to act until February 20, 1895, when he died. W. W. Edsall was then appointed receiver, qualified, entered upon his duties, and is still receiver in said cause.

During the months of August, September, October and November, and the 1st and 3d days of December, 1894, appellee, the petitioner, sold and furnished to said receiver, at his request, vegetables for use and consumption in the conduct of the hotel, to the amount of \$385.40, which were not paid for, though the accuracy of the claim was admitted by the receiver. Upon petition of appellee, filed February 4, 1895, the court allowed the claim and ordered the receiver to pay the same within twenty days from March 24,

1895. April 5, 1895, upon a showing by the receiver that he had no funds available to pay the claim, so much of the order as directed its payment was set aside. The receiver now has no funds and no property with which to pay the claim of appellee, though he testified that he did at one time have sufficient money in his hands to pay the claim, but was directed by the court to apply it to other uses.

In the summer of 1895 the then lessees of said furniture and fixtures surrendered them to the receiver, who turned them over to appellants, who appropriated the same to their own use. Upon a hearing the chancellor found that the amount due from the receiver to appellee was a charge and lien upon said furniture and fixtures at the time they were received by appellants, and directed that appellants, as trustees, within fifteen days from the date of the order, pay to appellee the amount so found due him, with interest at five per cent from December 3, 1894, or that they restore to the receiver the possession of said furniture and fixtures, and that in default of such payment that said furniture and fixtures be sold to pay the claim of appellee. From this order the appeal herein is taken.

JOHN W. SMITH and JESSE B. BARTON, attorneys for appellants.

B. F. CHASE and HARVEY LANTZ, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

It is claimed by appellants that the case of Knickerbocker v. McKindley, etc., Co., 172 Ill. 535, which involved similar claims against appellants, should not be considered by this court as *res adjudicata* upon this appeal, and they have attempted to point out wherein the case at bar is different from the McKindley case.

First. They say that it was stipulated in the McKindley case that Laughlin was appointed receiver on motion of complainant, whereas in this case it appears he was appointed on motion of the complainant, the defendant con-

senting thereto. We are unable, in the light of the decision in the McKindley case, to conceive why that difference in the two cases should make any difference in the result.

Second. In the McKindley case it appears that the furniture and fixtures in question were left in the possession of the receiver pending the appeal, and the receiver continued to conduct the hotel during that time by consent of the complainants and the defendant, whereas, in this case it is denied that there was any such consent, and there is no proof to overcome such denial. This should make no difference as to the result of this case. The property had to be preserved pending the appeal, and the hotel was conducted pursuant to the orders of the court. This, it was held in the McKindley case (page 546), was sufficient to charge the property with a lien for appellee's claim.

Third. In the McKindley case it was admitted that the coal and groceries for which those claims were made on the receiver, were necessary to enable the receiver to conduct the hotel, whereas in this case it is said that there is no proof that the vegetables in question were necessary, and also that the order of the court did not authorize their purchase. It does appear in this case that the vegetables were furnished at the request of the receiver, and after a hearing of appellee's petition, asking that the receiver pay for the same, the claim was allowed and the receiver ordered to pay it. This order was only set aside as to that part directing the payment, because there were then no funds in the hands of the receiver available for that purpose. This is sufficient proof, as we believe, that the vegetables were necessary to the conduct of the hotel by the receiver. As we have seen, the order appointing Laughlin receiver was broad enough to authorize him to purchase the vegetables and pay for the same from the receipts of the hotel. The McKindley case holds (page 548) that it is the duty of the court to pay the expenses of the receivership from the income of the property, and when that proves insufficient then to resort to the *corpus*. In this connection it is argued that resort can not be had to the *corpus* until a deficiency of the income is first shown, and that this is not

shown by the evidence. The receiver testified that he did not have the money with which to pay appellee's claim, that he had had money in his hands sufficient to pay the claims, but the court directed him to apply it to other uses. This evidence answers the argument of counsel. It must be presumed, in the absence of a showing to the contrary, that the orders of the court directing the receiver to apply the money in his hands to other uses were properly made.

Fourth. It is claimed that because in the McKindley case it was stipulated that the amounts due the petitioners in that case became and were a charge and lien upon the furniture and fixtures, and that in this case it is denied there was any such charge or lien thereon, that that difference prevents the McKindley case from being *res adjudicata*. An examination of the latter case shows that while the decision of the court was in part based upon that stipulation, it also held that because Gore was responsible for the creation of the indebtedness which resulted in the sale of the property in question, and for the expenses of the receiver, and because he procured the appointment of the receiver over the property, he created a charge thereon for the expenses of the receivership, and as the appellants could only claim through Gore, they could not "relieve the property of that charge by purchasing at a foreclosure sale under an incumbrance created by Gore and for the payment of which he and his representatives are liable."

After a careful consideration of the evidence in the light of the several contentions of appellants, and a comparison of the same with the McKindley case, *supra*, we are of opinion that, except as below stated, the questions raised on this record are fully adjudicated by the Supreme Court in that case.

It is claimed by appellants that the decree herein is erroneous, because they alone are made liable for the receivership expenses and claim of appellee, whereas, if there is any liability, it is a joint one with Heffron. A sufficient answer to this contention is that it is not covered by any assignment of error and can not be considered in this court.

The decree of the Superior Court is therefore affirmed.

Lyon & Healy v. James Pease, for the use, etc.

1. APPELLATE COURT PRACTICE—*Matters Which Can Not Be Raised in this Court for the First Time.*—The point that the trial court was without jurisdiction to try the case until jurisdiction was acquired of the person of one of the defendants, when the abstract fails to show that said person was a defendant in the court below, and no objection was made in that court, can not be raised for the first time in this court.

2. REPLEVIN BOND—*Nominal Damages and Judgment for Costs.*—Where the plaintiff in replevin dismisses his suit or suffers a nonsuit without a trial on the merits, he may show, in an action on the bond in mitigation of damages, that the property involved was in fact his property, and upon such showing being made, there can be recovery only for nominal damages.

3. REPLEVIN—*Practice in.*—The right to show, in an action on the bond, that the merits of the suit were not tried in the replevin suit, is given by statute. (Hurd's R. S., Ch. 119, Sec. 26.)

Debt, on replevin bond. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1899. Reversed. Opinion filed January 4, 1900.

CRATTY, JARVIS & CLEVELAND, attorneys for appellant.

It has been repeatedly held that where the replevin suit was dismissed, or the plaintiff took a nonsuit without a trial on the merits, in an action on the bond, if it was shown in mitigation of damages that the property involved in the replevin suit was in fact the property of the plaintiff in that suit, the only recovery that could be had in the action on the bond was nominal damages.

In such cases there is most clearly a breach of the bond, a failure to prosecute the suit with effect and without delay, and make a return of the property, if return thereof should be awarded. This condition is broken in such a case, yet for such a breach there can only be a recovery of nominal damages. *Chinn v. McCoy*, 19 Ill. 604; *Schweer v. Schwabacher*, 17 Ill. App. 78; *Webber v. Mackey, Nisbet & Co.*, 31 Ill. App. 369.

At common law, if the plaintiff failed on the issues on

the pleas of *non cepit* and *non detinet*, the plaintiff could not under any circumstances have a judgment in his favor for the property. The issues on these pleas being found for the defendant, the judgment of property in defendant followed as a legal consequence.

The common law in this respect is modified by our statute, by which it is provided that a judgment may be in favor of the plaintiff for the right of property, if it shall appear on the trial that he was entitled to the property, though at the time it was taken on the writ he was not entitled to the same, and the suit was wrongfully commenced. *Farwell v. Hanchett*, 120 Ill. 573.

"If the plaintiff in an action of replevin fails to prosecute his suit with effect, or suffers a nonsuit or discontinuance, or if the right of property is adjudged against him, judgment shall be given for a return of the property and damages for the use thereof from the time it was taken until a return thereof shall be made, unless the plaintiff shall, in the meantime, have become entitled to the possession of the property, when judgment may be given against him for costs and such damages as the defendant shall have sustained; or, if the property was held for the payment of any money, the judgment may be in the alternative, that the plaintiff pay the amount for which the same was rightfully held, with proper damages, within a given time, or make return of the property." R. S., Ch. 119, Sec. 22.

LEOPOLD M. STERN, attorney for appellee.

A plaintiff in replevin fails to maintain his action when there is a verdict finding the defendant not guilty. The court, in entering judgment on such a verdict, should not, however, award a *retorno*. *Mattson v. Hanisch*, 5 Ill. App. 102; *Bourk v. Riggs*, 38 Ill. 321; *Hackett v. Jones*, 34 Ill. App. 562.

A verdict for the defendant is in effect a finding that the plaintiff unlawfully took the property, and that there has been a breach of the replevin bond, in that the action has not been prosecuted with effect. *Cobby on Replevin*, Sec. 1260.

In an action on the replevin bond, where the merits of a replevin suit have not been determined, the defendant may

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prove his title in *mitigation* of damages. *Stevison v. Earnest*, 80 Ill. 531.

The Appellate Court will not review a question of law that might have arisen before a court trying a case without a jury, unless formal propositions of law were prepared and submitted and exceptions preserved to the rulings of the court thereon. *The Merrimac Paper Co. v. Ill. Trust & Savings Bank*, 129 Ill. 296; *County of La Salle v. Milligan*, 143 Ill. 321; *Hall v. Cox*, 144 Ill. 532; *First National Bank v. Haskell*, 124 Ill. 587.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant, Lyon & Healy, a corporation, brought replevin in the Circuit Court against P. Gross and David Stern, to recover certain goods and chattels, and executed its replevin bond, with Thomas Cratty as surety, to James Pease, sheriff of Cook county, conditioned as follows:

"Now, if the said Lyon & Healy, plaintiff, shall prosecute its suit to effect, and without delay, and make return of said property, if return thereof shall be awarded, and save and keep harmless the said sheriff in replevying the said property, and pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void, otherwise to remain in full force and effect."

The declaration consisted of two counts, the first, that the defendants wrongfully took and wrongfully detained; and the second, that they wrongfully detained the said goods, etc. Both defendants filed pleas of *non cepit* and *non detinet*; property in defendants; property in said Gross; property in said Stern; property in said Stern by force of a chattel mortgage given by P. and N. Gross to secure \$300, and that Stern, feeling himself unsafe and insecure, as provided by the mortgage, had the right to take immediate possession of the said goods, etc. Issues were made on all the pleas, and afterward the defendants filed an additional plea that said Stern loaned P. and N. Gross \$300, and took a mortgage therefor on said goods, which mortgage was duly executed and recorded at the time of the taking, and that there was due on the mortgage \$300, and by reason

thereof Stern had a lien on said goods, etc. To this additional plea plaintiff replied double, setting up six several replications upon which issues were made.

The cause having been dismissed as to David Stern, was tried before the court, a jury having been waived, and the court found "the defendant not guilty, but the right to the possession of the property in plaintiff," and gave judgment "that the defendant do have and recover of and from the plaintiff his costs and charges in this behalf expended, and have execution therefor. It is further considered by the court that the plaintiff do have and retain the property replevied herein by virtue of the writ of replevin issued in said cause." This judgment for costs was satisfied by the plaintiff, and thereafter this suit was begun before a justice of the peace by Pease, for the use of P. Gross against Lyon & Healy, on which judgment was rendered against the latter for \$60 damages, from which judgment an appeal was prosecuted to the Circuit Court, where, upon a trial before the court, without a jury, there was a finding for the plaintiff, and damages assessed at \$30, from which Lyon & Healy have prosecuted an appeal to this court.

It also appears that an appeal summons was issued, addressed to the coroner, to summon Thomas Cratty, impleaded with Lyon & Healy, which was served upon said Cratty by delivering a copy thereof to him, but it nowhere appears from the abstract that Cratty was a defendant, either in the justice court or in the Circuit Court.

By assent of the parties, by their respective counsel, the trial judge certified that the following question of law arose and was determined by the court on said trial, to wit: "Whether the said James Pease, for the use of P. Gross, was entitled to recover on the said bond, as damages thereon, attorney's fees for services rendered the said P. Gross in defending the said replevin suit, that is, whether there had been such a breach of the condition of said bond as would entitle the said P. Gross to recover attorney's fees for services incurred by him in and about the defense of said replevin suit, or any of the issues therein," and that said

Lyon & Healy v. Pease.

question and the decision of the court thereon was certified to this court for its review, in conformity with the statute in such case made and provided.

The point is made by appellant that the court was without jurisdiction to try said cause until jurisdiction was acquired of the person of Thomas Cratty. As we have seen, the abstract fails to show that Cratty was a defendant either in the justice court or the Circuit Court, and no objection was made in the court below as to the matter now raised. It can not be raised for the first time in this court, and even if it could, there was no error in not bringing in Cratty, as he does not appear to have been a party to the judgment before the justice nor in the Circuit Court. *Fabri v. Cunio*, 1 Ill. App. 240; *Bell v. Bruhn*, 30 Ill. App. 300.

The only other question raised which we deem necessary to be considered is as to whether there was such a breach of the bond as would permit the recovery of attorney's fees as damages. The condition of the bond was that the plaintiff "shall prosecute its suit to effect, and without delay, and make return of said property, if return thereof shall be awarded, and save and keep harmless the said sheriff in replevying the said property, and pay all costs and damages occasioned by wrongfully suing out said writ of replevin, then this obligation to be void; otherwise, to remain in full force and effect."

It is not contended by the appellee that there was any breach of the bond, except as to the condition to prosecute the suit to effect and without delay, and appellant's counsel impliedly concede that there is a breach in this respect. We are inclined, however, to the opinion there was no breach, because it can not be said that though the plaintiff failed on two of the issues presented when he was successful on the remaining issues, all involving the title to the property or a right to the possession of the property at the time the suit was commenced, it failed to prosecute its suit to effect. Whether the plaintiff was successful in the prosecution of his suit must be determined, not by his fail-

ure to maintain some of the issues, but by what was the result of the trial on all the issues. It succeeded in maintaining its right to the possession of the property by the finding and judgment of the court, and that was the very gist of the action. There is nothing in this record to show affirmatively that the plaintiff, by anything which occurred after the commencement of the suit, became entitled to the right to the possession of the property, and therefore, under the judgment on that issue, it can not be said that the writ of replevin was wrongfully sued out.

But, however that may be, in no event was appellee entitled to more than nominal damages, which would carry a judgment for costs. Where the plaintiff in replevin dismisses his suit or suffers a nonsuit without a trial on the merits, he may show, in an action on the bond, in mitigation of damages, that the property involved was in fact his property, and upon such showing being made, there can be recovered only nominal damages. *Chinn v. McCoy*, 19 Ill. 604; *Hanchett v. Gardner*, 138 Ill. 577; *O'Donnell v. Colby*, 153 Ill. 324-9; *Schweer v. Schwabacher*, 17 Ill. App. 78; *Weber v. Mackey*, 31 Id. 369-75; *Hertz v. Kaufman*, 46 Id. 591.

This right to show that the merits of the suit were not tried in the replevin suit is given by statute. (*Hurd*, Ch. 119, Sec. 26.)

If, then, the plaintiff is only liable for nominal damages, when confessedly there has been a breach of the bond by dismissing his suit or his suffering a nonsuit, when he can show his right to the property, the case at bar is much stronger, because here the merits in that regard have been found and a judgment rendered in its favor on that issue.

We are of opinion that no attorney's fees should have been assessed in appellee's favor, and since it appears that the costs in the replevin suit have been paid, and appellee, at most, could only be entitled to nominal damages, the judgment of the Circuit Court is reversed.

Maxwell v. Durkin.

**James Maxwell and Henry B. Maxwell, Copartners as
Maxwell Bros., v. Agnes Durkin, by Her Next Friend.**

1. **NEGLIGENCE—When a Question for the Jury.**—Where reasonable and fair-minded men might reach different conclusions, under all the circumstances shown in the evidence, the question as to whether defendant was guilty of negligence is one for the jury to decide.

2. **SAME—Prima Facie Case—City Ordinances.**—A person proved guilty of allowing horses to run loose upon the streets, in violation of a city ordinance, is *prima facie* guilty of negligence, and is bound to overcome it in order to successfully defend.

3. **APPELLATE COURT PRACTICE—Insufficiency of the Abstract.**—Where large portions of the evidence and proceedings of the court are either not abstracted at all or so insufficiently abstracted that the court is unable to form any definite opinion on these matters by reading the abstract alone, this court will be justified in affirming the judgment.

Action for Personal Injuries.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 4, 1900.

MEEK, MEER & COCHRANE, attorneys for appellants.

BRANDT & HOFFMANN, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Agnes Durkin, a child aged eight years, was on June 26, 1894, injured—her left leg being broken, which it is claimed caused a permanent tipping of the pelvis and curvature of the spine—by two horses of appellants at the crossing of Ashland avenue and Twentieth street, Chicago, she being run over by the horses while on her way home from school.

A trial before the court and jury resulted in a verdict and judgment in her favor of \$3,000, from which this appeal is prosecuted.

The first and second counts of the declaration are based upon an ordinance of the city imposing a penalty for permitting animals to run at large, the first count charging

86	257
86	257
94	*124
86	257
118	288
118	*441

reckless and wanton negligence, and the second charging simply careless and negligent conduct of defendants in suffering and permitting said horses to run at large on the streets of Chicago; also the second additional count, which further charges, after setting up the ordinance, that appellants carelessly and negligently suffered the horses to escape from their custody and control and to go at large on the streets, and that appellee, without fault, etc., was struck and run over by the horses. The first additional count charges that appellants carelessly and negligently suffered the horses to escape from their custody and control, and to travel loose and without control on the highways, etc.; and that plaintiff, who was then eight years of age and incapable of exercising much care for her safety, was, without fault or negligence on her part, and by reason of the careless and negligent conduct of appellants, struck by one or both of said horses, which ran against her and caused the injuries complained of. The plea was the general issue.

At the close of plaintiff's evidence, appellants moved to exclude the evidence from, and also to instruct the jury to find the defendants not guilty, which motions were both overruled, but were renewed at the close of all the evidence and were again overruled.

Among other instructions on behalf of appellants, the court instructed the jury, in substance, that the only issue upon which the plaintiff could recover was that the defendants carelessly and negligently suffered the horses to escape from their custody or control and permitted said horses to go at large, etc., and that to sustain this issue the plaintiff must prove not only that the horses got loose, but that they got loose by reason of the defendants' servant's negligence, thus, in effect, precluding the plaintiff from any right to recover under the first count of the declaration, which charged defendants with wanton negligence. No cross-errors are assigned.

Numerous instructions were given by the court, at the request of the defendants, which were as favorable to them as could have been asked under the law and the evidence

of the case. The court also refused, among others, five instructions asked by defendants, which will be referred to later.

The substance of the matters complained of by appellants is, first, that there was no case for submission to the jury under the evidence, because, it is claimed, there was no evidence of care on the part of plaintiff, nor of negligence of the defendants; second, that there was a variance between the allegations and proofs; third, that the damages were excessive and the result of improper conduct and remarks of counsel for plaintiff; fourth, that there was error in rulings as to the admission and exclusion of evidence; and, fifth, error in the refusal of instructions asked by defendants.

As to the first claim, it seems sufficient to say that, after a careful consideration of the evidence, in the light of the briefs and arguments of counsel, the case presents only matters of fact as to whether the evidence shows an exercise of such care on the part of plaintiff and such negligence on the part of defendants as would justify the court in submitting the case to the jury. We think that, upon both these points, there was sufficient evidence to justify its submission to the jury.

As to the care of the plaintiff, it appears that she was one of six or seven children who were crossing Ashland avenue at its intersection with Twentieth street, on their way home, having just been let out of school, and were in the middle of the street when appellants' horses came running along the street, one of the witnesses says, "about as fast as they could go," and another of the witnesses, that the horses "were on a gallop—were running away—ran right through the rank of them" (referring to the children). We think this evidence, considering the age of the plaintiff, was sufficient, not only to justify the court in submitting the case to the jury on the question of plaintiff's care, but was also sufficient to sustain the verdict of the jury in that regard. The law is plain as to the court's duty in this respect, and the citation of authority to support its action in this regard is unnecessary.

On the question of negligence, in so far as the evidence tends to show how the horses came to be running on the street at the time and place of the accident, only two witnesses, Smith and Steiner, testify. Their evidence is in direct conflict, and it is unnecessary to set it forth in detail. It appears that, at the time in question, the horses, which were lively and spirited, were driven, attached to a sleigh, by Steiner, who was appellants' employe and driver, into a livery stable, kept by one Bradford, where appellants were in the habit of keeping their carriages and sleighs, had them washed, oiled and cared for there, had their horses harnessed and unharnessed there, and which was used by appellants for every purpose except keeping their horses there; that Steiner unhitched the horses from the sleigh and proceeded to unharness them, and while so doing the horses escaped from him and ran out through a side or back door of the stable, through an alley, and thence onto the street, where they, or one of them, ran over the child. If the evidence of Smith as to how the horses escaped from Steiner was true, we are of opinion that it alone made a *prima facie* case of negligence on the part of Steiner, and it was therefore the duty of the court to submit the case to the jury on this point. Smith, so far as appears from the evidence, was entirely disinterested. Steiner's evidence as to how the horses escaped from him tended to show that he was not negligent in allowing the horses to escape, but even taking his own statement, we are of the opinion that reasonable and fair-minded men might have reached different conclusions as to whether, under all the circumstances shown in the evidence, he was negligent, and that being so, it was for the jury, and not the court, to say whether or not he was negligent. Moreover, he was to a degree an interested witness. It would be but natural for him to desire to appear to his employers as a careful and trustworthy driver, as well as to relieve himself from all blame for the very serious accident to the plaintiff, and therefore the weight to be given his evidence was a matter peculiarly for the consideration of the jury.

There was also evidence on behalf of defendants to the effect, in substance, that the manner in which Steiner testified that he unharnessed and handled the horses was the usual and customary method of careful business men of doing that thing in the city of Chicago in 1894 and since; and the court, at the request of defendants, in substance, instructed the jury that if they believed from the evidence the horses were handled and unharnessed, at the time they escaped, in the usual and customary manner in which such work was done by ordinary prudent livery men, or men accustomed to handling horses in the city of Chicago under like circumstances, then they should find the defendants not guilty. Even if this class of evidence was competent or proper, which we think doubtful, though it is unnecessary to decide in this case, there being no cross-errors assigned, the question still remains as to what, in fact, was the manner in which Steiner handled and harnessed the horses. On this question we are of opinion that the jury were justified in believing the testimony of Smith as to what Steiner did in handling and unharnessing the horses, and in disbelieving Steiner; and it was a question for the jury to determine, after having decided the manner in which the horses were handled and unharnessed, whether or not that manner was careless or negligent. We are not prepared to hold that the verdict is against the weight of the evidence on this point.

1st. The ordinance being declared on, and in evidence, and the plaintiff having shown that appellants' horses were loose upon the streets, the accident, and due care on her part, that proof made a *prima facie* case of negligence as against appellants, which they were bound to overcome in order to successfully defend. *Bulpit v. Matthews*, 145 Ill. 345-54; *R. R. Co. v. Dunleavy*, 129 Ill. 140; *Weick v. Lander*, 75 Ill. 96; *R. R. Co. v. Ashline*, 171 Ill. 314-19; *R. R. Co. v. Fell*, 79 Ill. App. 376-8; *Morris v. Stanfield*, 81 Ill. App. 264-70; *R. R. Co. v. Argo*, 82 Ill. App. 667-70.

2d. We are unable to appreciate the argument of appellants' counsel to the effect that there was a variance

between the allegations of the declaration and the proof. No such variance is specifically pointed out in counsel's brief and argument, nor have we been able to discover from the abstract where it is shown. Under such circumstances repeated decisions of this and the Supreme Court hold that the variance, if any, is waived.

3d. On the question of the excessiveness of the damages the evidence is conflicting. We would feel better satisfied had the verdict been for a smaller amount, but we are not prepared to say, from a consideration of the whole evidence, that the amount found was the result of passion, prejudice, mistake or misapprehension on the part of the jury. If the jury believed the evidence on the part of the plaintiff, then the verdict was clearly justified. Dr. Blanchard, a witness on behalf of appellee, a physician and surgeon of thirty years' experience, and for seven years connected with Mercy Hospital, Chicago, and who had, for five or six years, been the surgeon for the Home of Destitute Crippled Children, having as many as twelve or fifteen crippled children under his observation every week, testified that the left thigh bone of plaintiff had been fractured just above the middle; that there had been a strong union; that the union was, to a certain extent, vicious, and the bone bowed out half an inch or more than the normal curve; that such condition always changes the walking movement of the body, and that the shortening of this bone was upwards of three-quarters of an inch; that there was a large callous around the fracture, and that the shortening had the effect of tipping the pelvis downward; that the pelvis, in turn, holds the spine, and the spine is tilted to the left, deviating about one-half an inch from the perpendicular; that this condition makes a difference in the general contour of the body; changes the shape of the shoulders; that the curvature of the spine has a bad effect on the general health, acts more or less at present, in the case of the plaintiff, on the nervous system, displaces, to a certain extent, all the organs of the trunk of the body, as relative positions are always changed as soon as the relative posi-

tions of the spine are changed; also that the condition of plaintiff was permanent. It further appears that plaintiff was in bed from her injury five weeks; that she was carried around on a board for three or four weeks longer, and after that, crept around the floor for about two weeks; and that since she has been able to go about, she has dragged the limb and favored it; that she hangs over to one side; that the shoulder hangs over and the hip is over, and that there is a curve in the back.

On the part of appellants there was evidence tending strongly to show that the conditions testified to by Dr. Blanchard and the other witness for appellee, her mother, as to the injuries, did not exist to the extent stated. It also appears that plaintiff was in the court room, though she was not placed upon the stand; that defendants' counsel asked that an examination of her by physicians be permitted, which was not allowed by the court, though there was no objection interposed by appellee's counsel; but we are unable to say, upon a consideration of all the evidence and the circumstances attending the trial, including the conduct of counsel, which will be hereinafter more particularly referred to, that it is our duty to interfere with the amount of damages.

As the abstract has been prepared by appellants' counsel, it is insufficient to show all the material and important evidence bearing upon the issues of the case and the questions raised. Especially is this true as to the conduct and remarks of counsel for appellants and the evidence bearing upon the negligence of defendants. It is apparent, from the most casual examination of the abstract and record, that large portions of the evidence and proceedings of the court are either not abstracted, or so insufficiently abstracted that the court is unable to form any definite opinion on these matters by reading the abstract alone. Without noting particularly the matters thus improperly abstracted, we refer to the following pages of the record and the same pages appearing in the margin of the abstract, viz.: 63 to 69; 73, 86, 96; 143 to 145; 157 to 160; 385 to 396; 444, 466,

525, 532, 575, 582 and 588. This insufficiency of the abstract would alone have justified us, under repeated decisions of this court and the Supreme Court, in affirming the judgment; but inasmuch as the point has not been made, we have seen fit to examine the record somewhat.

The conduct and remarks of counsel for appellee from time to time, during the progress of the trial, were unbecoming, and certainly did not conduce to orderly and dignified proceedings in the trial of the cause. He frequently commented upon the testimony of witnesses, on many occasions charging the witness, in substance, with testifying untruthfully, and also charging counsel for appellants with endeavoring to induce the witness to testify as to matters which appellee's counsel openly charged that the witness knew nothing about. He also, on several occasions, impliedly, if not directly, charged appellant's counsel with stating untruths in the presence of the court and jury with regard to the evidence in the case. He further indulged, during the progress of the trial, in sarcastic and flippant remarks with regard to opposing counsel and witnesses, and even as to the rulings of the court, which were calculated to improperly influence the jury and induce in the minds of the jury disrespect, if not contempt, for courts and the administration of the law.

Counsel for appellants, however, was, in our opinion, equally to blame. He also, by numerous, and oftentimes by trivial objections to evidence, interrupted the orderly progress of the trial and a proper dispatch of the public business, and indulged in flippant and sarcastic remarks in the presence of the court and jury as to the opposing counsel, and also as to the testimony of witnesses, and frequently made insinuating, as well as direct charges that appellee's counsel had made untruthful statements in the presence of the jury as to the evidence of witnesses, and that he also endeavored to cause witnesses to testify untruthfully. On two occasions, in examining appellee's witnesses, he characterized the witness in his question as a "chambermaid in a livery stable."

So reprehensible was the conduct and remarks of counsel, both for appellants and appellee, that it brought forth frequent remonstrances and rebukes from the trial court, and in one instance the court said to appellants' counsel, "You have paid no heed to the injunction of this court repeatedly given you, and if your conduct is persisted in, much as I dislike to do so, I shall have to inflict punishment by fine." On another occasion the court said, "If these things continue, I shall just impose a fine on each of you" (referring to both counsel), "and it will be collected, too." From an examination of the record, we think the court would have been justified in imposing fines on both the counsel.

It would unduly extend this opinion to set forth any more specifically the improper remarks and conduct of counsel, and we therefore refrain from further particularizing. Had appellants' counsel conducted himself in a manner which was respectful to the witnesses and opposing counsel, and had refrained from all unbecoming and improper conduct in the progress of the trial, a very serious question would have been presented as to whether it was our duty to interfere with the verdict and judgment in favor of appellee because of the improper and unbecoming conduct and remarks of her counsel in the trial; but we are of opinion, from the matters above stated, that appellants are precluded, by the conduct and remarks of their counsel, from complaining because of the remarks and conduct of appellee's counsel. We also think that orderly, dignified and respectful conduct on the part of both counsel should have been enforced, and if necessary the court should have promptly imposed such punishment as would have secured that result. Notwithstanding the misconduct of appellants' counsel, we should not hesitate to award a new trial were it apparent that the judgment and verdict were the result of the improper conduct and remarks of appellee's counsel.

4th. Complaint is made that appellants were not allowed by the court to prove, by the witness Steiner, what was the usual and customary way of unharnessing horses

with harness of the kind on the horses in question, in the city of Chicago at the time of the accident; but we think the error, if any, in that regard, was cured by the witness subsequently testifying as to the manner in which he unharnessed the horses, and stating, as he did, "that is the way it is done all over; I have always seen it done that way every place. It can't be done any other way." Appellants were also allowed to show, by several other witnesses, what was the usual and customary way of doing such work in Chicago at that time and both before and after.

Complaint is also made that the court erred in permitting appellee to introduce in rebuttal evidence to the effect that different halters were used upon the horses on the day and at the time of the accident than those testified to by appellants' witnesses; also evidence as to the habit of Steiner, with reference to leaving these horses standing in the stable from which they escaped without their halters on, and after they had been unharnessed, at times as remote as two years previous to the day of the accident; also as to the horses running out of the stable when they had nothing on them at different times before the injury.

We think there was no error in either of the respects mentioned, because appellants had produced evidence in chief on the same matters in the direct examination of their witnesses. It is unnecessary to set out the evidence in detail.

We are also of opinion that, even if the evidence was not strictly rebuttal, it was material, as bearing upon the charge of negligence, and it was within the discretion of the trial judge to admit it at the time it was admitted. We see no abuse of discretion in the court's rulings in that regard.

5th. The refusal of the instructions of which complaint is made, was not, in our opinion, erroneous. It is unnecessary to set them out in this opinion. The ones numbered eight and ten took from the jury a consideration of certain matters in evidence bearing upon the question of defendants' negligence. The eleventh instruction is in substance covered by instructions one and nineteen, which were

given. The twentieth instruction is covered in substance by instructions fifteen, seventeen and eighteen, which were given. The twenty-seventh refused instruction was with reference to the credibility of the testimony of plaintiff on account of her interest in the result of the case. The plaintiff did not testify in the case, and it is surprising, to say the least, that appellants' counsel would claim that it was error to refuse this instruction.

It is also claimed that had the jury followed instructions numbers six and fifteen, given for appellants, they must have found a verdict of not guilty. These instructions are given with reference to appellants' testimony that the horses were handled and unharnessed in the usual and customary manner. What we have hereinbefore stated with reference to that evidence, we think, fully disposes of the contention made as to the verdict in view of these two instructions.

There being no reversible error in the record, the judgment is affirmed.

Charles Schmidt v. Albert Rehwinkel.

1. *PRACTICE—Power of Court After Expiration of the Term.*—After the expiration of the term at which the judgment is entered, the court has no power to make any substantial amendment or to set it aside.

Judgment by Confession.—Error to the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 2, 1900.

KRETZINGER, GALLAGHER & ROONEY, attorneys for plaintiff in error.

No appearance by defendant in error.

MR. JUSTICE FREEMAN delivered the opinion of the court. Defendant in error recovered judgment by confession

against the plaintiff in error, but subsequently the latter was allowed to plead, and did so. Replications having been filed, the cause was regularly set for trial. When reached, apparently upon the regular call of the trial calendar, no one appeared for the plaintiff in that suit, defendant in error here, and the cause was dismissed with judgment for costs against him. This occurred during the November term, 1898. No effort to vacate said order of dismissal appears to have been made during the remainder of said November term. But upon the first day of the December term following, on motion of defendant in error, the order of dismissal was set aside over the objection and exception of plaintiff in error, and such proceedings were thereafter had that judgment was again rendered against the latter, from which he prosecutes this writ of error.

The motion to vacate the order of dismissal and judgment for costs having been made after the expiration of the November term, at which judgment was entered, the court had no power to make any substantial amendment or to set it aside. *Becker v. Sauter*, 89 Ill. 596; *Coursen v. Hixon*, 78 Ill. 339; *Ayer v. City of Chicago*, 149 Ill. 262-266. The subsequent proceedings were invalid, the court having lost jurisdiction.

The judgment of the Circuit Court will be reversed and the cause remanded.

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Theodore W. Boske v. Elizabeth Collopy.

1. **NEGLIGENCE—*Must Be Proved.***—A person can not be held to be liable for the damages from a personal injury resulting from negligence where there is no testimony of any act or omission on his part which contributed to produce such injury.

2. **JURY—*Duty to Obey the Instructions of the Court.***—It is the duty of the jury to follow the instructions of the court, and a refusal to do so will be cause for reversal.

Action in Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presid-

Boske v. Collopy.

ing. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 2, 1900.

MANCHA BRUGGEMEYER, attorney for appellant.

SULLIVAN & McARDLE and P. L. McARDLE, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an action on the case commenced by appellee to recover from appellant damages for personal injury.

Appellant, at the time of the injury complained of, was the owner of several buildings situated at the corner of Thirtieth street and Emerald avenue, Chicago. Appellee was a tenant of appellant, occupying a flat in one of said buildings. Between two of said buildings and on the property of appellant was a board walk which rested on stringers, and was three or four feet up from the ground. August 6, 1894, when appellee was passing along said walk, some of the boards in it broke and she fell and fractured the bone in her left arm.

At the trial of said cause the court gave to the jury, on behalf of appellee, the following instruction, viz.:

“The court instructs the jury that if they believe from the evidence that the defendant rented apartments in the building in question to the plaintiff, and that the sidewalk in question was appurtenant to the building in question, and that the defendant had other tenants in said building; and if the jury also believe from the evidence that the defendant furnished said sidewalk for the use of all the defendant's tenants; and if the jury further believe from the evidence that the defendant was guilty of negligence, as charged in the declaration, and that such negligence caused the injury to the plaintiff; and also believe from the evidence that plaintiff was injured while in the exercise of ordinary care and caution on her part, then the defendant is responsible to the plaintiff, and she is entitled to recover from him compensation in money for all such injuries charged in the declaration, if any, which the jury believe from the evidence, was or were the direct, probable, proximate result of defendant's negligence.”

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And on behalf of appellant the court gave the following instruction, viz :

"The court instructs you, even though you find from the evidence that the walk in question was a part of the premises leased to plaintiff, the defendant would not be liable unless he knew of the defective condition of the walk, or by the exercise of reasonable care could have known of it, long enough before the accident to have it repaired."

Some complaint is made by appellant as to said instructions given on behalf of appellee. These instructions present the law correctly. But the jury did not follow them.

We have carefully examined the testimony and are unable to find any testimony whatever tending to show that there was any apparent defect in the walk in question; or that appellant had notice, or knew of any such defect; or that by the exercise of reasonable care he could have known of or have discovered any such defect. Neither do we find any testimony tending to show any negligence of any kind, by or on the part of appellant. Appellant can not be held liable for the damages resulting from the injury complained of, when there is no testimony of any act or omission on his part which contributed to produce such injury.

There being no such testimony in this record, the judgment of the Circuit Court is reversed and the cause remanded.

Alfred Stromberg and Androv Carlson v. Western Telephone Construction Co.

1. *CONTRACTS—Renewal After Rescission.*—A contract may, after a rescission thereof, be renewed, either by an express agreement of the parties thereto, or by acts which show an intention to give it new force and effect.

2. *SAME—Rescission Must be in Toto.*—If a contract be rescinded it must be *in toto*. It can not remain affirmed in part and in part repudiated.

3. *LANDLORD AND TENANT—What is a Rescission of Contract of Leasing.*—A notice from a landlord to a tenant to quit, for non-payment of rent, is a rescission of the contract of leasing.

Stromberg v. Western Telephone Construction Co.

4. *SAME—Waiver of Breach and Notice in Lease.*—The breach and notice in a lease are waived by the payment and receipt of rent accruing after the expiration of the notice.

Assumpsit, for royalties. Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 2, 1900.

LUDINGTON & JONES, attorneys for appellants.

Notice to quit is waived by the receipt of rent, as such, accruing after the expiration of the notice. 28 Am. & Eng. Ency. of Law, 553; Goodright v. Cordwent, 6 T. R. 219; Collins v. Canty, 6 Cush. (Mass.) 415; Prindle v. Anderson, 19 Wend. (N. Y.) 391; Blyth v. Dennett, 13 C. B. 176; Boggs v. Black, 1 Binn. (Pa.) 336.

If a lessor, after giving the lessee a general notice to quit, accepts rent for a time subsequent to the expiration of the notice, he thereby waives the notice and admits the continuance of the tenancy. Collins v. Canty, 6 Cush. (Mass.) 415.

When a tenant, with the consent of the landlord, express or implied, holds over his term, the law implies a continuation of the original tenancy upon the same terms and conditions. 12 Am. & Eng. Ency. of Law, 758, citing Webster v. Nichols, 104 Ill. 160; Clin. Wire Cloth Co. v. Gardner, 99 Ill. 151; Clapp v. Noble, 84 Ill. 62; McKinney v. Peck, 28 Ill. 174; Prickett v. Ritter, 16 Ill. 96; Miller v. Ridgely, 19 Ill. App. 306; Field v. Herrick, 14 Ill. App. 181; Wolz v. Sanford, 10 Ill. App. 136; Galloway v. Kerby, 9 Ill. App. 501.

The contract, when rescinded, must be rescinded *in toto*. Brown v. Schuler, 41 Ill. 192; Ryan v. Brant, 42 Ill. 78; King v. Mason, 42 Ill. 223; Wolf v. Dietzsch, 75 Ill. 205; Kellogg v. Turpie, 93 Ill. 265.

HOLMES, LYNN & SHIRRA, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was commenced by appellants to recover from

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appellee an amount claimed to be due upon a contract for the payment of royalties on "telephonic apparatus" manufactured by appellee under patents granted to appellants. The jury rendered a verdict assessing the amount due to appellants at \$302. Motion of appellants for a new trial was overruled and a judgment upon the verdict entered.

By letter dated June 16, 1894, appellants notified appellee that said contract was abrogated for failure on the part of appellee to comply with the terms thereof. Evidence was introduced tending to show that afterward appellants waived the alleged breach of said contract by appellee, and that said notice of the abrogation of said contract was rescinded, and that said contract remained in full force and effect. Counsel for appellant contend that the evidence shows that this was done by express agreement as well as by the acts of the parties. The questions of fact thus presented should have been submitted to the jury under proper instructions by the court.

At the instance of appellee the court gave to the jury the following instruction, viz.:

"The court instructs the jury that under the terms of the contract between the plaintiffs and the defendant, dated February 21, 1894, the plaintiffs had the right to abrogate the said contract and declare it null and void in the event that the defendant failed to keep any of the covenants of said contract by it to be kept; if the jury believe from the evidence that the said defendant failed to keep any of the covenants of the said contract by it to be kept, and that the said plaintiff thereupon elected to and did vacate and annul said contract, and wrote, signed and delivered to the defendant a letter dated June 16, 1894, and that the said letter gave notice to the defendant that the said plaintiffs had elected to abrogate said contract because of the failure of the said defendant to keep the covenants thereof; and you further find from the evidence that the defendant has paid the said plaintiffs in full for all royalties due under the terms of said contract up to the time of the receipt of the said letter; and you further find from the evidence that the plaintiffs had been paid for all telephonic apparatus made, used or vended by the defendant since said June 16, 1894, then and in that case you should find the issues for the defendant."

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The contract in question might, after a rescission thereof, be renewed, either by an express agreement of the parties thereto, or by acts which show an intention to give it new force and effect. *Graham v. Holloway*, 44 Ill. 385, 392; *Wilkinson v. Blount Mfg. Co.*, 169 Mass. 374.

A notice from a landlord to a tenant to quit, for non-payment of rent, is a rescission of the contract of leasing. In principle, it can hardly be distinguished from a rescission of the contract in question. The breach and notice in the matter of the lease are waived by the payment and receipt of rent accruing after the expiration of the notice. *Collins v. Canty*, 6 Cush. (Mass.) 415; *Prindle v. Anderson*, 19 Wend. 391.

Said instruction says to the jury, in effect, that if they believe from the evidence that appellants elected to and did abrogate said contract, and write said letter dated June 16, 1894, and that appellee had paid to appellants all royalties due under the terms of said contract, that then they should find the issues for the appellee. The question of whether said notice of abrogation had been waived by express agreement, or by the acts of the parties, is thus taken from the jury. That should not have been done. If the contract had been renewed by the parties in either of the modes indicated it was thereafter just as binding upon them as it would have been if said notice had never been given.

If a contract be rescinded it must be *in toto*. It can not remain affirmed in part and in part repudiated. *Kellogg & Co. v. Turpie*, 93 Ill. 265, 269.

Appellants offered in evidence duly certified copy of bill in chancery, filed by appellee February 6, 1896, in the Circuit Court of the United States for the Western District of Wisconsin, verified by the secretary of appellee company, in which it is charged that appellee is the sole owner, under and by virtue of said contract, of the letters patent mentioned therein. Appellants also offered in evidence a duly certified copy of a bill in chancery filed by appellee against appellants in the Circuit Court of the United States for the Northern District of Illinois, December 8, 1894, and verified

by the president of appellee company, in which it is charged in effect that said contract was then in full force and effect.

The objection of appellee to the admission of said bills in chancery in evidence, was sustained. They should have been admitted. They bore directly upon the question of whether said contract had been terminated under the notice of June 16, 1894. *Delaware Co. v. Diebald Safe Co.*, 133 U. S. 473; *Pope v. Allis*, 115 U. S. 363.

It is not deemed necessary to consider at length other errors assigned.

For the reasons indicated the judgment of the Superior Court is reversed and the cause remanded.

John P. Agnew v. Patrick J. Sexton.

1. *CONFESSION—Of Judgment for Rent.*—A power of attorney contained in a lease to confess judgment for rent due and interest, is valid.

Motion to Vacate Judgment by Confession.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 2, 1900.

SWENIE & MONAHAN, attorneys for appellant.

JOHN M. DUFFY, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In this case judgment was entered in the Circuit Court by confession in favor of appellee and against appellant for \$736.36. The judgment is for rent and interest thereon. The power of attorney to confess judgment is contained in the lease.

The lease was for the term of one year, which expired April 30, 1895. The total amount of rent under said lease is \$720. Judgment was entered for \$786.36. In that amount was included \$50 for attorney's fees. Upon a motion by appellant to set said judgment aside said sum of

\$50 was remitted, and said judgment remained for said sum of \$736.36.

In an affidavit made by appellant and filed in said cause in support of motion to vacate said judgment, he swears that he had paid \$82 for rent under said lease and that he refused to pay any more money on account thereof. It appears that in the entry of said judgment said payment of \$82 was credited on account of rent due under said lease, and that said judgment is for \$638 rent and \$98.36 interest thereon.

Appellant entered his motion in said cause to set aside said judgment and for leave to plead. In his said affidavit filed in support of said motion, he gives several small items amounting together to a little over \$100, which he states are due to him from appellee, and also a claim for \$750 stated to be due from appellee to a firm of which appellant is a member and which claim had been assigned by said firm to appellant. That claim could not be allowed as a set-off against the claim of appellee for rent under said lease.

Appellant does not ask to have said small items allowed to him, but moved that the entire judgment be set aside. That motion was overruled, and we think correctly so.

Perceiving no error, the judgment of the Circuit Court is affirmed.

A petition for a rehearing has been filed in this cause by the appellant. The reason urged in said petition is, that in the above opinion this court did not refer to the case of *Little v. Dyer*, 138 Ill. 272, and contending that under the rule laid down in that case the power of attorney in the case at bar "is absolutely null and void." By reference to the case of *Fortune v. Bartolomei*, 164 Ill. 51, affirming the same case reported in 62 Ill. App. 290, it will be seen why it was not necessary to refer to the *Little* case. In the case at bar after the remittitur was entered the judgment was only for rent and interest thereon. As to that the power of attorney was valid. No valid reason for any change in the order by this court affirming the judgment of the Circuit Court is apparent.

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108	*545

Henry C. Shendorf v. Bernard Gorman.

1. **PRACTICE — Proving Negative Averments — License.**—Where a license is directly in issue, and it is peculiarly easy for the party required to be licensed to establish the fact of the license by producing it, an unreasonable hardship would result from requiring the other party to establish a negative by producing the public records, to show that no such license had in fact been issued.

2. **SAME—Where a License is Collaterally Involved.**—Where the question of license is only collaterally involved, as in suits by attorneys at law or physicians, to recover for professional services, the license will be presumed unless proof to the contrary be presented by the other party.

3. **HORSESHOER'S ACT—Registry Only, Required.**—Under the horseshoers' act (Laws 1897, 233), providing for the licensing of horseshoers in cities of certain population, a registry only, as a horseshoer, is required of persons who have been, previously to such enactment, engaged in such business.

4. **LICENSE—Not Required Under the Horseshoers' Act.**—Under the horseshoer's act no license is required of a person previously engaged in the business of horseshoeing, but merely to register as a horseshoer.

5. **REGISTRATION—Burden of Proof.**—When the means of proving the fact of registration under the horseshoer's act are equally within the control of each party, the burden of proof is upon the party averring the negative.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

Statement.—Appellee, who is a horseshoer by trade, agreed with appellant to do appellant's horseshoeing from December 3, 1897, until March 3, 1898, at a price stated. There is due for work done under this agreement \$180. Appellee brought suit for this amount before a justice of the peace, and recovered a judgment for \$180 "for wages as a laborer," and the sum of \$25 as his attorneys' fees was taxed as part of his costs. Upon appeal to the Circuit Court trial was had and a verdict and judgment for \$180 resulted. There was no claim for attorneys' fees allowed in the Circuit Court; but the judgment of the Circuit Court

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was for the sum of \$180 "together with plaintiff's costs and charges in this as well as in the court below expended."

The statute of this State, known as the "Horseshoers' Act," provides for the licensing of horseshoers in cities of certain population, and contains this exception to such provision:

"Section 4. It shall be the duty of every person who is engaged as a horseshoer in this State, to cause his or her name and residence to be registered with said board of examiners within six months after the date of the passage of this act, and said board of examiners shall keep a book for that purpose, and it shall be the duty of said board to know that the persons so registering are horseshoers, and every person who shall so register with said board as a horseshoer, may continue to practice the same as such without incurring any of the penalties provided for in this act."

Appellee had been engaged as a horseshoer in this State for fourteen years previous to the enactment. Upon the trial appellee was permitted to testify, over objection of appellant, that he had registered as a horseshoer.

I. T. GREENACRE, attorney for appellant, contended that the license, or registration, if any, is a matter particularly within appellee's knowledge, and the burden of proving that he had a horseshoer's license or had properly registered is upon appellee.

As a general rule, either affirmative or negative allegations must be proved. This rule even applies where both parties have an equal opportunity of proving or disproving a negative allegation; but where the subject-matter of negative averment is peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. *Great Western R. R. v. Bacon*, 30 Ill. 347; *Robinson v. Robinson*, 51 Ill. App. 317, and cases cited.

Being licensed or registered is a matter peculiarly within the knowledge of the licensee, etc., which he must prove. *Eckert v. Collot*, 46 Ill. App. 361.

Where, in a civil case, a criminal offense is charged in the pleadings, or an issue involves such an offense, the rule of

evidence applicable in a criminal prosecution for such offense applies, as in proof of justification in slander charging crime. *Crandall v. Dawson*, 1 Gil. 556; *Harbison v. Shook*, 41 Ill. 141.

MORSE, IVES & TONE, attorneys for appellee.

Section 14 of the Horseshoers' Act provides (Laws 1897, 233):

"It shall be the duty of the secretary of the board of examiners to notify all practicing horseshoers in the State of Illinois of the provisions of this act within six months after the board shall have been appointed."

The evidence shows that appellee was a practicing horseshoer at the time in question, and there is no evidence that any notice was sent to appellee by the secretary of the board of examiners concerning the provisions of the act. Where the statute provides that notice of a certain kind is to be given to the public, or persons to be affected by a law, such provisions are mandatory and no jurisdiction acquired until the requisite notice is given. (*Sutherland on Statutory Construction*, Sec. 457.) The statute in question provides no place where horseshoers can register, or where persons can apply to be examined, and it was presumably the intention of the legislature that the board in question would open its offices at some convenient place and give notice to all practicing horseshoers to appear and register, and it was intended until such notice had been received by the horseshoers, they should not be liable to any of the penalties of the act.

Penal statutes are to be strictly construed and the burden was upon the defendant to show that notice had been given of the provisions of this law. The presumption that the secretary did his duty would not prevail here, but the sending of the notice was a material fact to be proved by appellant. *United States v. Ross*, 2 Otto, 281.

There was no evidence here that a horseshoers' board had been appointed by the governor, or that they had qualified, or that they had opened offices at any place where persons could appear and register.

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The appointment and qualification of the officers of the board, and the proceedings of the board, should have been brought before the trial court as evidence. Such is the rule in reference to the proceedings of the legislature of our State. *Grob v. Cushman*, 45 Ill. 119; *Illinois Central Railroad Co. v. Wren*, 43 Ill. 77.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But two questions are presented upon this appeal which require determination, viz.: First, whether the burden of proof was upon appellee to show that he had registered as a horseshoer in order to entitle him to a recovery for his labor in shoeing appellant's horses; and, secondly, whether the judgment by the justice of the peace, which recited that appellee recovered for wages as a laborer, is conclusive against a recovery in the Circuit Court, upon appeal for breach of contract to pay the \$180.

Upon the first question there is some diversity of authority. The appellant relied upon the defense that appellee had not registered, and hence could not recover for labor performed in contravention of the statute. There are cases where a negative averment will be taken as true unless disproved. These are cases where the proof necessary to disprove the averment lies peculiarly within the knowledge and possession of the other party. When a license has been issued to a person it is held that it is peculiarly within his knowledge and within his power to prove the same by simply producing the license. *Great Western R. R. v. Bacon*, 30 Ill. 347; *Williams v. People*, 121 Ill. 84; *Harbaugh v. City*, 74 Ill. 367; *People v. Nedrow*, 16 Ill. App. 192; *Robinson v. Robinson*, 51 Ill. App. 317.

But this rule has been for the most part applied to cases wherein the question of a license was directly involved, as in criminal prosecutions for transacting business without a license or actions to recover a penalty upon like ground. The rule has been, it is true, also applied to cases where the question was collaterally involved, as in suits by a broker (required to be licensed) for his commissions.

But there is very great weight of authority to the effect that where the question of license is only collaterally involved, as in suits by attorneys at law or physicians to recover for professional services, the license will be presumed, unless proof to the contrary be presented by the other party. *Williams v. People*, 20 Ill. App. 92; *Pearce v. Whale*, 5 Barn. & C. 38; *McPherson v. Cheadell*, 24 Wend. (N. Y.) 15; *Thompson v. Sayre*, 1 Denio (N. Y.), 175; *Brown v. Young*, 2 B. Mon. (Ky.) 26; *Horan v. Weiler*, 41 Pa. St. 470.

In *Williams v. People*, *supra*, this court, speaking by Mr. Justice McAllister, said :

“After a somewhat thorough examination of the authorities and full consideration, we are of the opinion that the rules with their proper distinctions may be thus stated : Where the question of license or qualification of a physician arises collaterally in a civil action between party and party, or between the doctor and the one who employed him, then the license or due qualification under the statute to practice will be presumed. (*McPherson v. Cheadell*, 24 Wend. 15; *Thompson v. Sayre*, 1 Denio, 175; *Pearce v. Whale*, 5 Barn. & Cres. 38; *Id.* 758.) But in the case of prosecutions on behalf of the public the rule is otherwise. And, in such cases, license or due qualification under the statute is not presumed, and it rests with the defendant to prove it.”

In *McPherson v. Cheadell*, *supra*, the New York court said :

“Where the question does not arise directly on indictment or action for violating a statute which requires a license, but comes in collaterally, as here, the books are very strong that you can not question the fact of there being a license until you show by negative proof that there was none.”

In *Brown v. Young*, *supra*, the Kentucky court said :

“As the proof that the note was given for the price of the clock, and that the vendor was a clock peddler, raises no presumption that a license had not been obtained, the question of license or no license can not be considered as having been raised by such proof, and there was no call upon the plaintiff to produce the license or make proof of it.”

In *Horan v. Weiler*, *supra*, the Pennsylvania court said :

"It is enough in this case to say that the defendant's plea of non-assumpsit raised no question of authority in the plaintiffs to maintain their action, and hence they might recover without producing their license, and of course without saying anything about it in there *narr*. The cases cited prove the rule that a breach of law is not to be presumed against any one, and that the presumption is to the contrary until proof overcomes it."

The reason of the rule and the criterion by which to test its application, is that where the license is directly in issue, and it is peculiarly easy for the party required to be licensed to establish the fact of the license by producing it, an unreasonable hardship would result from requiring the other party to establish a negative by producing the public records to show that no such license had in fact been issued. *Hyde v. Heath*, 75 Ill. 381.

Whatever may be said as to the application of the reason equally to civil suits when the question of a license arises collaterally, it is nevertheless true that the very great weight of authority is to the effect that in such suits the license will be presumed, in absence of proof. In this case, however, there is another consideration, viz., that here no license was required. Appellee having been for years engaged in the business of horseshoeing, he was not required by the terms of the act to obtain any license, but merely was obliged to register as a horseshoer. There is no evidence that any certificate or other document was issued to those thus registering. The terms of the act provide for nothing of the kind. So far as the evidence discloses, the only manner in which either party could establish that appellee had or had not registered, would be by production of the books of the public office, or other competent proof of their contents. This was as much within reach of one party as the other, and of like inconvenience to each. "When the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative." *G. W. R. R. Co. v. Bacon*, *supra*.

We are inclined to the opinion that if appellant wished to

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raise question as to whether appellee had complied with the statute by registering, he should have presented proof, and that in the absence of any proof, it is to be presumed that the appellee had thus registered. Therefore the admission of the testimony of appellee to the effect that he had registered was not prejudicial error.

The remaining question is as to the recovery having been for wages before the justice of the peace. There can be no question on this record but that the claim recovered upon in the Circuit Court was precisely the claim upon which the suit before the justice of the peace was founded, viz., the work done by appellee in shoeing the horses of appellant. It is not of any consequence that in the judgment of the justice of the peace a sum was taxed with the costs as attorney's fees. No such allowance was made in the Circuit Court. The judgment there was for only such costs as had been expended by appellee.

There is no defense upon the merits, and there being no prejudicial error disclosed, the judgment will be affirmed.

The judgment is affirmed.

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86	282
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St. Luke's Hospital v. George S. Foster, Adm.

1. **PLEADING—*Death from Negligent Act.***—A declaration by a personal representative for damages for the death of the person represented by him, in which there is no averment that the deceased left her surviving a husband or next of kin, or that any one suffered any pecuniary loss because of her death, states no cause of action.

2. **LIMITATIONS—*Amendments to Declarations.***—Where the original declaration contains no cause of action, an amendment filed more than two years after the alleged cause of action accrued, remedying the defect, and by which a cause of action is stated, is amenable to the statute of limitations the same as if a new suit had been commenced at the time of the amendment, for the cause of action then stated.

Action in Case.—Death from negligence. Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed, but not remanded. Opinion filed January 2, 1900.

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SIDNEY RICHMOND TABER, attorney for appellant; ARTHUR J. EDDY, of counsel.

The amended declaration was obnoxious to the defendant's demurrer, because it failed to show any financial loss to the plaintiff, which is the gist of the action and indispensable to recovery. *Maney v. C., B. & Q. R. R. Co.*, 49 Ill. App. 105; *City of Salem v. Harvey*, 29 Ill. App. 483; *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338; *I. C. R. R. Co. v. Weldon*, 52 Ill. 290; *Bailey v. C. & A. R. R. Co.*, 4 Biss. 430, 434; *C., R. I. & P. R. R. Co. v. Morris*, 26 Ill. 400.

The declaration was amended too late, and the plea of the statute of limitations was not obnoxious to the plaintiff's demurrer, because the original declaration was defective in omitting the essential allegation of the survivorship of next of kin, as well as of pecuniary loss. *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546; *C., R. I. & P. R. R. Co. v. Morris*, 26 Ill. 400.

It is a well established* rule of pleading that "a new cause of action, distinct from that already averred in the declaration, can not be set up by way of amendment to the declaration, as by adding additional counts to the declaration after the time for suing upon such cause of action has expired by the statute of limitations. But when the amendment by an additional count is introduced merely to restate in a different form the same cause of action set up in the declaration as originally drawn, and not to present a new and different cause of action, the rule does not apply, and a plea of the statute of limitations to such a new count can not be sustained. When the body of the declaration (in the case then before the court) is examined, where the cause of action should be set up, no cause of action whatever is averred in the declaration. The amended count does, however, set up a cause of action, but inasmuch as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action—one which had never been stated before—and hence the statute of limitations was a good defense. There could be no restatement of a cause of action by the amended

declaration unless the cause of action had been stated before." Eyllenfeldt v. Illinois Steel Co., 165 Ill. 185; see also Ill. & St. L. R. R. & C. Co. v. People, 19 Ill. App. 141; Phelps v. I. C. R. R. Co., 94 Ill. 548; Chicago, B. & Q. R. R. Co. v. Jones, 149 Ill. 361.

BEACH & BEACH and M. SLUSSER, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is an action on the case, in which it is sought to recover damages for the death of Candis Foster. Her death was caused by falling from a fifth story window in St. Luke's Hospital, Chicago, December 6, 1895. This suit was commenced February 27, 1896, and the declaration filed April 10, 1896. The suit, as commenced, and the original declaration were by "George S. Foster, executor of the last will and testament of Candis Foster, deceased, plaintiff." The relation of George S. Foster to Candis Foster, deceased, does not appear, either in the praecipe, summons or original declaration. Neither is there any averment in said declaration that said Candis Foster left her surviving a [husband or next of kin, or that any one suffered any pecuniary loss because of her death.

November 2, 1898, an amendment to said declaration was filed averring that said George S. Foster is "the husband and only surviving heir and beneficiary of the said Candis Foster, deceased," and that "said plaintiff was deprived of the services and companionship of his said wife."

To the declaration, as thus amended, the appellant, after its demurrer thereto had been overruled, filed a plea of the general issue and a plea of the statute of limitations. To this latter plea a demurrer was filed by appellee and sustained by the court. It is now here contended by appellant that said declaration, as amended, states a new cause of action and was not filed within two years "next after the cause of action accrued," that being the statutory limitation. It is not necessary to consider whether the declara-

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tion, as amended, is sufficient, and we express no opinion as to that.

The first question to be considered is, did the original declaration state a cause of action? In *L. S. & M. S. Ry. Co. v. Hessions*, 150 Ill. 546, 556, it is said that "It is the settled law that the fact of survivorship of a widow or next of kin is an essential element to the cause of action, and it is therefore indispensable that it should be alleged and proved." And on page 558 the rule is restated thus: "As already seen, the fact that plaintiff's intestate left him surviving next of kin was an essential element, which must be alleged and proved to entitle plaintiff to recover."

In *C. & R. I. R. R. Co. v. Morris*, 26 Ill. 400, 403, decided in 1861, Mr. Justice Breese, speaking for the court, says: "Before a party suing for these damages can be allowed to recover, it must be alleged in the declaration, and proved, that the deceased left a widow, or next of kin, to whom the damages could be distributed. * * * The fact that there are persons entitled by law to claim this indemnity, and that they have sustained a loss justifying their claim, must be proved on the trial, and therefore must be averred in the declaration, as much so as the death of the party and the wrongful act or neglect of the defendant."

In *Quincy Coal Co. v. Hood*, 77 Ill. 68, 72, Mr. Justice McAllister, speaking for the court, says: "But the fact of the survivorship of a widow or next of kin, being an essential element of the cause of action, renders it indispensable that it should be alleged in the declaration." The recent case of *Atlanta, K. & N. Ry. Co. v. Hooper*, 92 Fed. Rep. 820 (Tenn.), is directly in point and fully supports the views here expressed.

Clearly, under these authorities, the original declaration did not state a cause of action. By the amendment thereto it is sought to introduce a new cause of action. That amendment was filed more than two years after the alleged cause of action accrued. Where a new cause of action is thus introduced the statute of limitations applies the same as it would in a new suit commenced at

the time such amendment was made. *Eylenfeldt v. Ill. Steel Co.*, 165 Ill. 185, 187 and 189; *C., B. & Q. R. R. Co. v. Jones*, 149 Ill. 361, 397; *Phelps v. I. C. R. R.*, 94 Ill. 548, 557; *Field v. French*, 80 Ill. App. 78, 89; *C. C. Ry. Co. v. Leach*, 182 Ill. 359, 364.

Counsel for appellee seek to show that the *Eylenfeldt* case is not in point, because it is there stated that "If the plaintiff had stated his cause of action in a defective manner, omitting some feature which should have been incorporated in it, then an amendment restating the cause of action would not fall within the statute." But that language does not apply to the case at bar, for the reason that the original declaration does not state any cause of action. There can not be a "restating" of a matter which has not been before stated.

The only other case referred to by counsel for appellee upon this question is *Haynie v. C. & A. R. R. Co.*, 9 Ill. App. 105. That case is in point and sustains the contention of counsel for appellee. It is, however, prior to the *Eylenfeldt* case, which lays down a directly opposite rule. We can not follow the *Haynie* case.

The judgment of the Circuit Court must be reversed for the reason indicated. But as the statute of limitations has run so that no cause of action can now be stated upon which a recovery can be sustained, the cause is not remanded.

City of Chicago v. Adam Wolf et al.

1. *PRACTICE—Power of Court at Subsequent Term.*—If the clerk has failed to make a record, at the time, of what the court had ordered to be done at the term when the judgment was rendered, the court has power at the subsequent term to cause the clerk to enter upon the records the previous order made at the previous term, having before it some minute or memorial paper showing what such order was.

2. *JUDGMENTS—When Final.*—A judgment does not become absolutely final while it is still within the control of the trial court and subject to be amended or set aside.

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3. *SAME—Amendments in Form or Substance.*—The statute provides (Sec. 23, Chap. 110, R. S.) for amendments at any time before final judgments on such terms as are just and reasonable, in matters of form or substance, in any pleading which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought.

4. *DECLARATION—Containing a Good Statement of a Valid Cause of Action.*—If the declaration contains a good statement of a valid cause of action, although it may contain other matters open to special demurrer, it will not be obnoxious to general demurrer.

5. *SAME—Defects Cured by Proper Amendments.*—If the declaration contains a defective statement of a good cause of action, such defects can be cured by proper amendments.

6. *PLEADING—Declaration Alleging General Breach.*—A declaration is not fatally defective merely because the breach alleged is general.

Debt, upon a bond. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded, with directions, Mr. Justice HORTON not concurring in that portion of the opinion which relates to the declaration. Opinion filed December 14, 1899. Rehearing denied.

CHARLES S. THORNTON, corporation counsel, attorney for appellant; ALLEN C. STORY, special counsel.

After judgment and the lapse of the term, courts have, in general, no power to amend the record. *Cox v. Brackett*, 41 Ill. 222; *Horner v. Horner*, 37 Ill. App. 199; *County of Cook v. Dock Co.*, 131 Ill. 505; *Becker v. Sauter*, 89 Ill. 596; *Lill v. Stookey*, 72 Ill. 495.

LAWRENCE HARMON and FREDERICK S. BAIRD, attorneys for defendants.

Where errors and mistakes of the court's officers are apparent from the minutes of the judge, other entries of the same record, or the proceedings and files in the cause, and there is something to amend by, courts will not hesitate to make such amendments as will advance justice and sustain the rights of the parties. *Coughran v. Gutcheus*, 18 Ill. 391. *Gebbie v. Mooney*, 121 Ill. 255; *Ogden v. Lake View*, 121 Ill. 422; *People v. Anthony*, 129 Ill. 218; *Walla-han v. People*, 40 Ill. 103; *Richardson v. Mills*, 66 Ill. 525; *In re Barnes*, 27 Ill. App. 151; *Jansen v. Grimshaw*, 125

Ill. 473; *Lampsett v. Whitney*, 3 Scam. 170; *Smith v. Clinton Bridge Co.*, 13 Ill. App. 572.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action in debt upon a bond, with a penalty of \$22,500,000, given by appellee as city treasurer of Chicago.

The points before us for consideration arise from the action of the court in sustaining the demurrer of appellees to appellant's replication to the first plea, and directing that such demurrer be carried back and sustained to the first count of the declaration; also in sustaining appellees' demurrer to appellant's replication to the eighth and only remaining plea. Appellant having elected to stand upon said first count of its declaration, and its said replications, judgment was given against the city of Chicago with costs.

Within the term in which such judgment was entered, appellant's counsel suggested to the court that the pleadings did not raise the issues as they should have been made; that counsel had unadvisedly elected to rely upon said pleadings as they stood; that a large sum of money and questions of great importance were involved; and that, as the pleadings stood, what ought to have been the issues could not be reviewed on appeal. Appellant's counsel therefore moved for a vacation of the judgment, and for leave to file an amended declaration to adapt the pleadings to the former finding of the court. This motion was denied.

The errors relied upon for reversal arise, as stated by appellant's counsel, "on the pleadings on denial of the motion for a repleader" and on a "*nunc pro tunc* amendment of the record."

Final judgment in the case was entered at the May term, 1898. The *nunc pro tunc* order complained of was entered October 24th following, and consisted of inserting in the amended declaration the words "account for and," so that the sentence should read "refuse to account for and pay over the same or any part thereof," etc.

It appears from the appellees' abstract, showing the amendment of the record, that the court had before it, at

the time the *nunc pro tunc* order complained of was made, a carbon copy of typewritten amended declaration, upon which the judge had in his own hand inserted the words in question at the time said amendment was directed to be made. It was from this written memorandum, "in order to make the record conform to the truth and fact, as the same appears on the court files in this cause," that the *nunc pro tunc* amendment appears to have been made. If the clerk has failed to make a record, at the time, of what the court had ordered to be done at the term when the judgment was rendered, the court had power at the subsequent term to cause the clerk to enter upon the records the previous order made at the previous term, having before it a minute or memorial paper showing what such order was. *Gebbie v. Mooney*, 121 Ill. 255-258. Whether there was any error in the method of procedure, or whether, as is claimed, the memorial paper or note of the judge was insufficient or could not be made part of the record by which to amend, can not be considered upon this record, for the reason that no such error is assigned. *French Piano & Organ Co. v. Meehan*, 77 Ill. App. 577.

It is urged that the court should have allowed the motion for a repleader, and for that purpose should have set aside the judgment.

The discretion vested in the courts to grant or deny motions of this character, when made in apt time, is not an absolute, but a legal discretion, and is subject to review. A judgment does not become absolutely final while it is still within the control of the trial court and subject to be amended or set aside. The statute provides (Sec. 23, Chap. 110, R. S.) for amendments at any time before final judgment on such terms as are just and reasonable, in matters of form or substance, in any pleading "which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought." If there is shown in the declaration in question any valid claim, which, if properly pleaded and sustained by the evidence, entitles appellant to recover, then, unless some good objection, such as gross

negligence, unreasonable delay, other means of relief, or like sound reason for refusal appears, it is in accordance with the spirit of that statute to afford opportunity of amendment in order that appellant may not be barred from relief to which it may be able to show itself justly entitled.

A demurrer to a replication to a plea filed by appellees, was carried back and sustained to the declaration itself, to which a demurrer had been previously overruled. At first appellant's counsel elected to stand by the declaration, and they still maintain that it was error to carry back and sustain the demurrer thereto. But afterward, and within the term, they sought leave to amend said declaration so as to present the issues as they state they should have been; and urged, in support of such motion, the public importance of the questions and the large sum of money involved.

If the declaration contained a good statement of a valid cause of action, then, although it may have contained other matters open to special demurrer, it would not be obnoxious to general demurrer. If it contains a defective statement of a good cause of action, then such defect could be cured by proper amendment.

Appellees' counsel insist that the declaration shows no legal breach of the obligation of the bond. The condition of said bond is as follows:

"The condition of the above obligation is such that whereas the above bounden Adam Wolf was, on the second (2d) day of April, A. D. 1895, elected to the office of city treasurer, in and for the city of Chicago, to hold said office for the period of two (2) years and until his successor shall be duly elected and qualified, or until said office shall be otherwise legally vacated.

"Now, therefore, if the said Adam Wolf shall well and faithfully perform and discharge the duties of said office as prescribed and required by law, and the orders and ordinances of said city, and shall account for and pay over all moneys received by him as such city treasurer, in accordance with law and in accordance with orders or ordinances heretofore passed, or hereafter to be passed by the city council of said city in conformity with law, and deliver all moneys, books, papers, and all other property belonging to said city to his successor in office, then this obligation to

be void, otherwise to be and remain in full force and effect."

The declaration sets forth the execution of the bond; that appellee Wolf was the duly elected and acting city treasurer until the day of the expiration of his term; that in accordance with law it was his duty as such treasurer to turn over to his successor in office all moneys belonging to the city; that during his term of office he collected and received, by virtue of his office and in accordance with law (\$24,352.88), twenty-four thousand, three hundred fifty-two dollars and eighty-eight cents belonging to the city, which it was his duty to account for, pay over and deliver to his successor in office on or before April 6, 1897; that since the expiration of his term and prior to the commencement of the suit, payment had been demanded and refused and that he refuses to account for and pay over the same or any part thereof, and has converted the same to his own use contrary to law; and further, that during his term of office he has illegally and without authority paid out four thousand eight hundred twenty-two dollars and ninety-three cents (\$4,822.93) received by him as city treasurer, by virtue of his office and in accordance with law, which sum, together with interest thereon, at the rate of five per cent per annum from the date of the respective payments, was and is the property of the city, which, although duly demanded, he refuses to account for and pay over to his successor in office as required by law, and that by reason of the breach of the conditions the said bond became and was forfeited.

It is apparently the contention of appellees' counsel, not only that this declaration is insufficient, but that no recovery can be had at all under the condition and language of the bond. It is said that the language of the condition, viz., "and deliver all moneys, books, papers and all other property belonging to said city, to his successor in office," is not the language of the statute. Whatever conclusion is intended to be drawn from this seems to be based upon the impression that neither the statute prescribing the condi-

tion, nor the condition itself, requires the treasurer to account for and pay over all moneys belonging to the city to his successor in office. But the statute contains a provision applicable to all city officials, requiring all property and effects on hand at the expiration of the term of office to be delivered to the successor in office. R. S., Chap. 24, Art. 6, Sec. 5. Aside from this, however, it appears to be claimed that the condition of the bond does not conform to (Sec. 4, p. 77) the laws and ordinances of Chicago, providing that the bond of elective officers shall be "conditioned for the faithful performance of the duties of the office, and the payment of all moneys received by such officer according to law and the ordinances of said city."

If this were true, it would not by any means follow that the bond in controversy voluntarily executed is not a good, valid and binding common law obligation. *Todd v. Cowell*, 14 Ill. 72; *Mix v. The People*, 86 Ill. 329, and cases there cited. Nor do we perceive the necessity for argument to show that the condition of the bond does not require the treasurer to "account with and pay over to his successor in office all moneys received by him during his two-year term of office." No such claim is presented in the declaration, so far as we can discover.

Appellees' material contention, however, is that the treasurer is required by the law and ordinances to account with the city comptroller, and the argument is that the assignment in the declaration of breaches in that condition of the bond, which requires the treasurer to "account for and pay over all moneys received by him as such city treasurer in accordance with law," and to deliver all moneys and other property "belonging to said city to his successor in office," is materially at variance with the condition itself.

The first assignment of breach is in substance that the treasurer "during his term of office collected and received money belonging to the city," which it became his duty as treasurer, "and in accordance with law, to account for, pay over, and deliver to his successor in office." It is not neces-

sary to construe this language to mean that it was the treasurer's duty to *account with* his successor. It is not the same thing to account *for* a balance to the successor as to account *with* the comptroller in order to ascertain such balance. Having accounted with the comptroller and ascertained the balance, it may still remain for the treasurer to account for such balance and pay it over. In one sense of the word he can not pay it over without accounting for it—that is, explaining what he has done with it and where it can be found, if he does not turn over the actual cash, or *counting* it over to his successor to ascertain if the amount is correct, if he turns over the actual money itself. In either case it is in a sense accounted for. The assignment charges that it was the treasurer's duty "*in accordance with law, to account for, pay over and deliver to his successor;*" in other words, to do each of these things—to account for, to pay over and deliver to his successor—in accordance with law. If we are right in this view of the meaning and construction of the language of the assignment, there is no material variance between it and the condition of the bond declared on. We are not to be understood as saying that the declaration can not be improved. It certainly can. But the question before us is whether the declaration states a good cause of action, and we are of opinion that it does. The purport of the said assignment is that said treasurer received, as treasurer, specific sums of money which it became his duty as treasurer, in accordance with law, to pay to his successor in office, and that he has ever since refused, and refuses still to perform his duty in this respect.

The pleas are at least full, and upon the whole record a substantial cause of action appears. While the breach is general, that is not a fatal defect. *Gradle v. Hoffman*, 105 Ill. 147-153.

As the case must be sent back, affording opportunity for amendment, and may proceed to trial and judgment, we refrain from consideration at this time of other questions discussed to some extent by counsel. The suit is brought in part to recover interest which it is claimed the treasurer received and improperly retains. Until the pleadings are

in shape to present the real questions more accurately, we do not deem it necessary or proper to now discuss upon the merits, issues not fully raised by the pleadings, and which may present a different aspect upon a fuller record.

The record disclosing a substantial cause of action, the judgment will be reversed and the cause remanded, with directions to permit appellant to amend its declaration upon payment of costs in the Circuit Court.

Reversed and remanded, with directions.

MR. PRESIDING JUSTICE HORTON.

In that portion of the foregoing opinion which relates to the declaration, I can not concur, either in the reasoning or the conclusion. It is inconsistent to hold that the declaration is good and at the same time to hold that the court erred in overruling the motion of appellant for leave to amend the same. The declaration is not good. But I concur in so much of said opinion as holds that appellant should have been allowed to amend.

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190s 243 Simon P. Douthart, Executor, etc. v. Frank G. Logan,
Benjamin B. Bryan and Theron Logan.
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Same v. Same.

1. *GOOD WILL—Of a Partnership—Existence of, a Question of Fact.*—Upon the question of the existence of a “good will” as a firm asset, where different conclusions might be reached by reasonable and fair-minded persons, the findings of the court below on such question are conclusive.

2. *SAME—Defined.*—The “good will” of a partnership may be defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises, name, or other matter.

3. *SAME—Described by Story.*—“Good will” may be properly described to be the advantage or benefit which is acquired by an establishment beyond the mere value of the capital, stock, funds or property employed therein, in consequence of the general public patronage and encouragement which it receives from constant or habitual customers, on account of its local position or common celebrity, or reputation for skill, or affluence, or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices.

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4. **SAME**—*In What Cases it Does Not Exist*.—No “good will” can exist except in cases of commercial or trade partnerships. It does not exist in cases of professional business depending on the personal skill of, and confidence in the particular partner, in the absence of a special contract.

5. **SAME**—*Partnership in the Commission Business*.—The court holds that no “good will” exists in a partnership engaged in the business of buying and selling grain and produce on commission, in the absence of a special contract.

Bill by Surviving Partners.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed December 14, 1899.

Statement by the Court.—Appellant filed his bill in the Circuit Court of Cook County against appellees for an accounting of the copartnership business of F. G. Logan & Co., a firm composed of appellant's testator and appellees, and also of the copartnership business of the firm of F. G. Logan, which latter firm was composed of the appellees, and asking that appellees pay the amount which might be found due on such accounting to appellant, also asking that a receiver be appointed to sell the partnership property, including the good will, to collect the assets, and fully wind up the copartnership of F. G. Logan & Co.

Appellees answered the bill, to which replication was filed, and the cause was consolidated with an appeal by appellant to said Circuit Court from certain proceedings in the Probate Court of Cook County in the estate of Daniel Butters, deceased, in which the Probate Court denied an application for a rule on the surviving partners of F. G. Logan & Co. to inventory certain open accounts of that firm, and overruling objections of the executor to and approving the partnership inventory and appraisal and supplemental partnership inventory.

A hearing of the consolidated causes was had before the chancellor, which resulted in a decree finding the facts substantially as hereinafter stated, confirming the inventories and appraisal in the Probate Court, and decreeing that all the doings of appellees, as surviving partners of F. G.

Logan & Co., were proper and correct, and as members of the firm of F. G. Logan; that appellees did right in failing to inventory a good will of the firm of F. G. Logan & Co., in appraising the leases of said firm, as being of no value, in failing to inventory the open trades of said firm, and that the sum of \$1,154.68, paid by appellees to appellant on December 28, 1898, is 6-32 of all the profits of the business of F. G. Logan & Co. collected by appellees since October 10, 1896, and is all thereof to which appellant is entitled. The decree also directs appellees, as surviving partners, to collect the remainder of the choses in action in their hands belonging to the firm of F. G. Logan & Co., make account thereof to said Probate Court, and pay to appellant 6-32 thereof, after deducting expenses of collection.

The decree further directs that appellees pay to appellant the sum of \$2,163.88, which the court finds is 6-32 of the net profits of the business of the firm of F. G. Logan & Co., as carried on by appellees, from the 12th day of August to the 10th day of October, 1896, less the sum of \$523.77 theretofore paid by appellees as surviving partners to said appellant, to wit, the sum of \$1,640.11.

From this decree the appeal herein is taken, and both errors and cross-errors are assigned. The appellant claims that the court erred in not requiring appellees to account for the good will of the business of the firm of F. G. Logan & Co., and for certain leases and open trades belonging to that firm, and not requiring appellees to account for the net profits earned by them after the 10th day of October, 1896, while doing business under the firm name of F. G. Logan, and also in rejecting certain evidence of an expert witness, which, it is claimed, would show the existence and value of the good will.

Appellees, under their cross-errors, claim that the court erred in requiring them to account to appellant for 6-32 of the net profits of the business of F. G. Logan & Co. from August 12 to October 10, 1896, instead of 1-24 of such profits.

The evidence shows that from about the year 1877 and up to the filing of the bill in this case, the appellee Frank

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G. Logan, had been engaged in the commission business in the city of Chicago, being associated with different persons as partners during that time, and that for sixteen years prior to 1896, the firms with which he was associated bore the firm name of F. G. Logan & Co. In January, 1891, he became associated in business with Daniel Butters and two other persons, and the partners of the firm were changed five times thereafter, in 1893, 1894 and in 1895, both Logan and Butters, however, remaining members of the different firms existing during that period, and the firm being known as F. G. Logan & Co.

On March 1, 1896, written articles of copartnership were entered into between said Butters and appellees, which provided that the business of commission merchants should be carried on by the firm in Chicago and elsewhere under the firm name of F. G. Logan & Co. from March 1, 1896, to the last day of February, 1897, the capital of the firm to be \$120,000, of which Frank G. Logan was to contribute \$114,000, appellee Theron Logan \$1,000, Butters \$5,000, and appellee Bryan nothing; Frank G. Logan to have 19-32 of the profits, and also to draw monthly from the moneys of the firm \$900; Butters to have 6-32 of the profits and draw monthly \$500; Theron Logan to have 2-32 of the profits and draw monthly \$250, and Bryan to have 5-32 of the profits and draw monthly \$500; the several amounts to be drawn by the several partners to be charged to the expense account of the firm. The losses of the business were to be borne by the respective partners in proportion to their respective interests in the profits thereof. It was also provided that any partner might withdraw from the firm on thirty days' written notice, and should have the right to withdraw the just share of the capital and profits to which he should be entitled at the time of his withdrawal, but that his monthly allowance provided by the contract should cease on the date of such withdrawal.

Butters died August 12, 1896, leaving a will by which he appointed appellant his executor, who qualified as such. At that time the firm of F. G. Logan & Co. occupied a room in the Board of Trade building in Chicago under a sub-

lease from F. G. Logan to the firm, from April 1, 1896, to March 31, 1897, at a yearly rental of \$3,800, payable in equal monthly installments. The lease provides that the room should be used for the transaction of the firm business and for no other purpose, and in case of default in any of its covenants by the lessee, the lessor could declare the lease ended and re-enter the premises, and also that the lease should not be assigned, nor the premises let or underlet without the written consent of the lessor, and in case of a breach of this covenant the lease should be void, at the election of the lessor. Frank G. Logan at this time had a lease of the same room from the Board of Trade to himself from May 1, 1896, to April 30, 1897, at the same rental he charged the firm, and also a prior lease which expired on April 30 1896. He also had had other leases of the same room, the first of which commenced May 1, 1894, and expired April 30, 1895, and a second lease, the same that is above referred to, which expired April 30, 1896. He sublet the room to the different firms in which he was a partner, each sublease expiring at a date prior to the expiration of his lease.

The firm also had leases of private telegraph wires from different telegraph companies between different large cities in the United States, principally between Chicago and other cities, at large yearly rentals, all of which leases were subject to cancellation by either party at any time on thirty days' notice, and any one could get a similar lease by paying similar rents. These wires were used to transmit orders to the firm and for giving information by the firm as to the condition of the markets. Each of the partners had an individual membership in the Board of Trade of Chicago, and Frank C. Logan owned a membership upon the New York Stock Exchange.

The commission business, as conducted by the firm, was largely a personal matter, and its extent depended upon the personal acquaintance of the different members of the firm. It was speculative, and its extent depended very largely upon the personal confidence or trust of the different clients in the judgment of the particular partner of the firm

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who was called upon to transact the business. In many instances the names of the customers did not appear upon the firm's books except by numbers, the identity of the particular customer being known only to the member of the firm with whom he intrusted his business.

Settlements were made at the time of the several changes in the partners of the firm of F. G. Logan & Co., above referred to, in which the different partners receipted each to the other for all claims to accounts due to the old firm, and on one occasion, June 22, 1895, the partners indorsed in writing a trial balance of their books, which they stated contained all the assets and liabilities of the old firm, and thereby receipted "in full, each to the other, everything up to date." There was no mention at any time of good will on the books of the different firms of F. G. Logan & Co., of which Butters was a member. Butters did not contribute any capital to any of the different firms of F. G. Logan & Co. in which he was a partner prior to March 1, 1896.

At the time of the death of Mr. Butters the firm had on hand a large number of open trades, which extended for long periods, and in some instances for six months thereafter. These trades were of such a nature that the firm could not realize upon them until they expired, except by the order of the customer, and could earn no commissions thereon nor make any charges against the customers until the trades were closed. To close these open trades required that the business of the firm should be carried on for at least the period of six months, which would have entailed an expense of about \$10,000 per month, which was about ten times the value of the open trades to the firm. Appellees took these open trades and the full commissions, when they were settled up, to which the firm would then have been entitled, and credited the firm of F. G. Logan & Co. with one-half of that amount.

After the death of Mr. Butters appellees continued to do business until October 10, 1896, under the firm name of F. G. Logan & Co., at the same place, with the same capital and in the same manner as they had transacted business

prior to his death. During this time they acted under the advice of appellant, who is an attorney at law. Appellant told appellees, about the 1st of October, 1896, that, inasmuch as he was trustee and executor under the will of Mr. Butters, they should get another attorney. Appellees thereupon procured other counsel and proceeded at once to settle the partnership estate in the Probate Court. On October 10, 1896, they sent the following telegram over their wires to all customers who had open trades with the firm, to wit:

“Owing to the death of our late partner, Daniel Butters, and the dissolution thereby of the partnership heretofore carried on under the firm name of F. G. Logan & Co., of Chicago, composed of Frank G. Logan, Daniel Butters, Ben B. Bryan and Theron Logan, said firm has ceased doing business, and a new partnership has this day been formed by the undersigned for the transaction of a general commission business, under the firm name of F. G. Logan. If you desire us to transfer your open trades or balances to the new firm, kindly wire us to that effect, otherwise wire us what other disposition to make of them.

Chicago, October 9, 1896.

FRANK G. LOGAN,
BEN B. BRYAN,
THERON LOGAN.”

They also at the same time published a similar notice in leading newspapers in Kansas City, New York, Minneapolis, St. Louis and Chicago.

Appellees also formed a new partnership under the name of F. G. Logan, opened a new set of books, and, in all instances where ordered, transferred the trades of F. G. Logan & Co. to the books of the new firm.

On the same date appellees tendered to appellant the sum of \$9,812.60, being \$4,257.83 for Butters' proportion of the profits in the firm of F. G. Logan & Co. up to August 12, 1896, which was 6-32 of such profits; also \$523.77 for Butters' interest in the profits of said firm from August 12th to October 10, 1896, being 1-24 of such profits, his monthly allowance as provided by the partnership articles being deducted; also \$31 as the share of Butters in the furniture belonging to said firm, being 6-32 of its appraised value; and also \$5,000, being for the capital

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contributed by Butters to the capital stock of said firm. Appellant received from and receipted to appellee Frank G. Logan for said total amount, but qualified his receipt by stating that it should not be taken or considered as a final or full settlement of the interest of Butters in the assets of said firm, but for money paid on account of the same.

October 7, 1896, appellees, as surviving partners of the firm of F. G. Logan & Co., caused to be appointed appraisers of the partnership estate by the Probate Court of Cook County, and thereafter they filed an inventory and supplemental inventory in said Probate Court of the partnership estate, in which was included the lease of the room in the Board of Trade building, and also said wire leases, but they did not include any good will of the late firm, nor said open trades. The report of the appraisers set down the said leases as being of no value. Appellees filed in said Probate Court a report showing among other things that they had closed out said open trades of the late firm and charge one-half the commissions to be derived therefrom by the late firm to themselves, although said trades had not been consummated and could not be consummated until an order should be received from the customers directing the closing thereof, and no commissions had been earned or collected by appellees at the time of the death of said Butters. The one-half of the full commissions was thus included in the report of the profits of the late firm up to August 12, 1896, the date of Butters' death. The whole report thus made to the Probate Court included the total amount coming to the estate of said Butters from appellees, to wit, \$9,312.60, as above stated, as having been paid over to appellant by appellees.

The said inventory, supplemental inventory and report of appraisers was approved by the Probate Court, and the same were found to be correct by the chancellor, except as to the item of net profits of the late firm from August 12 to October 10, 1896, which was modified by the chancellor, who found that appellant was entitled to 6-32 of such profits instead of 1-24, as stated in said report to the Probate Court, and which made a difference of \$1,640.11 in

favor of appellant, which was directed to be paid to him by appellees.

It was further found by the decree, and the evidence in our opinion sustains the findings, that there was no good will of the firm of F. G. Logan & Co. at the date of Butters' death or since, and none was contemplated between the partners, and that said firm did not own a membership in the Chicago Board of Trade nor in the New York Stock Exchange; also that from and after October 10, 1896, appellees did not carry on any business under the name of, or belonging to F. G. Logan & Co., nor use any of the property of that firm in the business of F. G. Logan, but as surviving partners did promptly, and as was their duty, collect the accounts and choses in action belonging to said late firm and rendered on account thereof to appellant, and did pay over the same to him, except as specially found by said decree and herein above referred to.

It further appears from the evidence that at the death of Butters the capital of F. G. Logan & Co. was unimpaired; and that the estate of Butters was entitled to \$5,000, or the 1-24 part thereof, which was paid to appellant by appellees; also that the lease to the firm of the room in the Board of Trade building, and also the said wire leases, were canceled on the 10th of October, 1896, by appellees, by indorsing the cancellation thereof on the face of such leases. Also that said leases were of no value.

It further appears, though not found by the chancellor, that prior to and up to the death of Butters the firm of F. G. Logan & Co. did a large and profitable business, the net profits amounting, the year prior to Butters' death, to \$60,000, and had a large list of customers, with their addresses, who were scattered over a vast territory in the United States; also that after the 10th of October, 1896, appellees, under the name of F. G. Logan, did, at once, commence to do a large business, and earned a net profit of more than \$5,000 per month.

The only oral evidence received on the hearing was that of Frank G. Logan. Appellant produced another witness, T. Carrabine, who testified that he was a dealer in lands in

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old Mexico; had had some experience in buying and selling out businesses; had been engaged in the live stock commission business at Sioux City and in Chicago; had sold his good will in a certain firm at Sioux City; had had experience in Chicago with reference to good will, and that there was a custom among traders and business men with reference to getting at the value of a good will of a business, but that he had never been engaged in the commission business and had never been a member of the Board of Trade of Chicago. The chancellor ruled out the evidence of this witness, and also held that appellant could not show by him the general custom adopted by commission merchants and others to arrive at the value of a good will, and also refused to allow the witness to state, in answer to a hypothetical question embodying an assumption of the facts shown in the other evidence as to the extent and nature of the business of F. G. Logan & Co., his opinion as to the value of the good will of such a business. The chancellor held that the proof of a custom with reference to good will was not competent, and that it was immaterial whether the witness had an opinion as to the value of the good will or not.

DOUTHART & BRENDKE, attorneys for appellant.

A dissolution by death puts an end to the partnership at that time, and the surviving partners become trustees by operation of law. They hold all the partnership property as trustees, and it is their duty to close out the business and sell all the property, including the good will, if any there be, and distribute the proceeds. If they continue the business it is at their own risk, and they will be liable to the legal representatives of the deceased partners to account for the profits made after the decease, or may at the election of such representatives be charged with interest on the deceased partner's share of the capital and surplus, besides bearing all losses themselves. *Helson v. Hayner et al.*, 66 Ill. 487; *Forrester, Executrix, v. Oliver, Admr.*, 1 Ill. App. 259; *Remick, Admr., v. Emig et al.*, 42 Ill. 348; *Raymond v. Vaughn*, 128 Ill. 256; *Beale v. Beale*, 2 N. E. Rep. 65; *Clay*

v. Field, 138 U. S. 464; Galbraith v. Tracy, 153 Ill. 54; Ramelsberg v. Mitchell et al., 29 Ohio St. 22.

The modern definition of the term "good will," as adopted by our Supreme Court, is: "The good will of a partnership may be defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises, or name, or other matter." Farwell et al. v. Huling, 132 Ill. 119; Bates on Partnership, Sec. 957; Story on Partnership, Sec. 99; A. & E. Ency. of Law, Vol. 8, 1366.

"If the language of Lord Eldon is to be taken as a definition of good will of general application, I think it is far too narrow, and I am not satisfied that it was intended by Lord Eldon as an exhaustive definition. Good will must mean every advantage—every positive advantage, if I may so express it—as contrasted with the negative advantage of the late partner not to carry on the business himself, that has been acquired by the old firm in carrying on its business, whether connected with the premises in which the business was previously carried on, or with the name of the late firm, or with any other matter carrying with it the benefit of the business; and it is absurd to say that when a large wholesale business is conducted the public are mindful whether it is carried on in Fleet street or in the Strand." Trego v. Hunt, Law Reports, Appeal Cases 1896, 17.

Good will is generally used to denote the benefit arising from connection and reputation, and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business its good will has a market value, whether the business is that of a professional man or any other person. Lindley on Partnership, 439.

Where there is no evidence to show the value of the good will, then the court will value it at so many years purchase on the average profits made by the firm previous to the time of dissolution of the firm. 17 Am. and Eng. Ency. Law, 1197; Lindley on Partnership, 448; Austin v. Boys, 2 De G. & J. 629; Mellesch v. Keen, 28 Beav. 453; Sheppard v. Boggs, 9 Neb. 257.

The good will does not belong to the surviving partners, but is an asset that must be sold with the other property

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and an account of the sale thereof made to the estate of the deceased partner. *Remick, Adm'r, v. Emig et al.*, 42 Ill. 348; *Am. and Eng. Ency.* 1371; *Rammelsberg v. Mitchell et al.*, 29 Ohio St. 22; *Willingford v. Burr*, 17 Neb. 137; *Sheppard v. Boggs*, 9 Neb. 258; *Hathaway v. Bennett*, 10 N. Y. 108; *Hays, Adm'r, v. Hay*, 6 Atl. Rep. 12; 2 *Lindley on Partnership*, 443; *Crowshay v. Collins*, 15 Vesey, 226; *Smith v. Everett*, 27 Beav. 451; *Wedderburn v. Wedderburn*, 22 Beav. 103; *Dougherty v. Van Nos*, 1 Hoffman (N. Y.), 68; *Dayton v. Wilkes*, 17 Howard Pr. (N. Y.) 510.

The assets, including the good will, should be sold altogether as a going business, and not in piecemeal or as a dead concern. *Mellesch v. Keen*, 27 Beav. 236.

The canceling of the leases to the several offices and the private wire system, and the taking in place thereof new ones in the name of F. G. Logan, did not change the ownership, but the new leases became the property of the old firm. *Gow on Partnership*, 255; *Featherstonhaugh v. Fenwick*, 17 Ves. 298; *Spears v. Willis* (N. Y.), 45 N. E. Rept. 849.

HAMLIN, SCOTT & LORD, attorneys for appellees.

The surviving partners take title to all the assets. *People, etc., v. White et al.*, 11 Ill. 342.

The executor has nothing to do with them. *Miller v. Jones*, 39 Ill. 61.

They have a right to continue in possession, settle business and then account to executor. *Hayward v. Burke et al.*, 151 Ill. 130.

As surviving partners they may use firm name. *Com. Nat. Bk. v. Proctor*, 98 Ill. 538.

This possession will not be wrested from them save upon a clear showing of mismanagement. *Bates, Partnership*, 993; 17 *Am. & Eng. Ency. Law*, 115; *Painter v. Painter*, (Cal.) 36 Pac. Rep. 975; *High on Receivers*, 497.

Surviving partners may sell any of the property. *Emerson v. Senter*, 118 U. S. 8.

May make an assignment for the benefit of creditors or

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mortgage it. *Havens & Geddes Co. v. Harris* (Ind.), 39 N. E. Rep. 49.

They have a right to retain the property until debts are all paid. *Clay v. Freeman*, 118 U. S. 106.

The Illinois administration act gives cumulative remedies to the executor. *Nelson v. Hayner et al.*, 66 Ill. 487.

Under Secs. 87 and following sections (1 Starr & Curt. Stats. (2d Ed.), 317), if surviving partner does not make an inventory list of liabilities and appraisement of partnership affairs in sixty days a receiver may follow. But the surviving partners can not carry on the business for a single day after the death of deceased partner. *Oliver v. Forrester*, 96 Ill. 316.

Or spend the money of the firm in new contracts or purchases. *Remick v. Emig*, 42 Ill. 343.

In carrying on the business of the old firm after Butters' death the surviving partners, at the most, technically misappropriated Butters' capital. They are chargeable for all losses sustained, and are liable to pay to the executor at his election that proportion of the profits earned by the wrongful use of Butters' capital which such capital bears to the entire capital of the firm, *i. e.*, one twenty-fourth part thereof, or be charged with interest upon the deceased partner's capital. 2 *Lindley, Partnership* (Ewell's Ed.), 976, 979, 981, 984-991; *Gates v. Finn*, L. R. 13, Ch. Div. 839; *Mellersh v. Keen*, 27 Beav. 242; *Robinson v. Simmons*, 146 Mass. 167; *Bernie v. Vandever*, 16 Ark. 616; *Skidmore v. Collier*, 8 Hun (N. Y.), 54; *Story on Partnership*, 343, 346; 17 *Am. & Eng. Ency. Law*, 1166; *Millard v. Ramsdale*, Harr. Ch. 393; *Freeman v. Freeman*, 142 Mass. 106; *Durbin v. Barker et al.*, 14 Ohio, 311; *Holmes v. Gilman*, 138 N. Y. 369.

The case of *Clay v. Field*, 138 U. S. 474, is not to the contrary. *Oliver, Adm., v. Forrester*, 96 Ill. 324, held interest should be paid.

There were no open trades for surviving partners to inventory. *Nelson v. Hayner*, 66 Ill. 487, does not apply.

The lease of the office was subject to Logan's control. *Medinah Temple Co. v. Currey*, 162 Ill. 441; *Taylor, Land-*

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lord and Tenant (5th Ed.), Par. 409; Doe v. Clark, 8 East, 185; Doe v. Hawke, 2 East, 481; 1 Wood, Landlord & Tenant (2d Ed.), 719.

There was no good will belonging to the firm of F. G. Logan & Co. at the date of Butters' death.

Good will—is it anything more than the probability that the old customers will resort to the old place? Remick v. Emig et al., 42 Ill. 348; Crutwell v. Lye, 17 Vesey, 346; Parson's Partnership (3d Ed.), 286; Chittenden v. Whitbeck, 50 Mich. 421; Cassidy v. Metcalf, 1 Mo. App. 601; Morgan v. Schuyler, 79 New York, 493; Moody v. Thomas, 1 Disney, 298; 1 Collier, Partnership (6th Ed.), 240; Bell v. Ellis, 35 Cal. 635; Potter et al. v. Gorman, 65 Ga. 14.

The latest English cases define it to be "every possible advantage acquired by a firm carrying on its business, whether connected with premises or name or other matter." Farwell v. Huling 132 Ill. 119, referring to Bates on Partnership, Sec. 657, based on Genesi v. Cooper, L. R. 14, Ch. Div. 596.

Lindley bases its value on absence of competition. 2 Lindley on Partnership (Ewell's Ed.), 859.

The surviving partner can not be prevented from engaging in same kind of business or from soliciting the old customers, unless he voluntarily makes a sale of the good will. Labouchere v. Dawson, L. R. 13, Eq. Cases, 324; Leggott v. Barrett, L. R. 15, Ch. Div. 309; Walker v. Mottram, L. R. 19, Ch. Div. 355; Pearson v. Pearson, L. R. 27, Ch. Div. 145; Vernon v. Hallam, L. R. 27, Ch. Div. 34 (1888); Trego v. Hunt, A. C. H. of Lds. (1896) 7, affirming Labouchere v. Dawson, *supra*, recognizing Walker v. Mottram, *supra*; 17 Am. & Eng. Ency. Law, 1189.

This has ever been the English rule in cases of involuntary sales. Crutwell v. Lye, 17 Vesey, 334; Johnson v. Hellely, 2 DeG., J. & S. 444; Jennings v. Jennings, L. R. 1, Ch. 378 (1898).

In the United States, selling partner may solicit old customers. No restraint on trade may rest on inference. Smith v. Gibbs, 44 N. H. 335; Findlay v. Carson (Iowa), 66

N. W. Rep. 761; *White v. Jones*, 1 Abb. Pr. (N. S.) 337; *Hoxie v. Chaney*, 143 Mass. 592; *Bergamini v. Bastian*, 35 La. Ann. 60; *McCord v. Williams*, 96 Pa. St. 80; *Cottrell v. Babcock Printing Press Co.*, 54 Conn. 138; *Bassett v. Percival*, 5 Allen (Mass.), 345; *Hanna v. Andrews*, 50 Ia. 462.

In no case will the vendor, even in England, be prevented from setting up same kind of business. *Trego v. Hunt*, *supra*; *Smith v. Everett*, 27 Beav. 446; *Hall v. Barrows*, 4 DeG., J. & S. 150; *Cook v. Collingridge*, 27 Beav. 458, 2 Lindley, Part. (Ewell's Ed.) 860.

The American cases and earlier English cases hold that good will, at least where it consists of location, survives to surviving partners. *Hammond v. Douglass*, 5 Vesey, 539; *Lewis v. Langdon*, 7 Sim. 425 (1818); *Robertson v. Guidington*, 28 Beav. 529 (1860); *Smith v. Everett*, 27 Beav. 454; *Mellesch v. Keen*, *Ib.* 240; *Story on Partnership* (5th Ed.), 161; *Parsons on Partnership* (3d Ed.) 482-262; 31 Cent. Law Journal, 157; *Staats v. Howlett*, 4 Denio, 560; *Lobeck v. Lee* (Neb.), 55 N. W. Rep. 650; *Musselman's Appeal*, 62 Pa. St. 81.

The partnership name survives to surviving partner. *Webster v. Webster*, 3 Swanst. 490; *Lewis v. Langdon*, 7 Sim. 425; *Robertson v. Guidington*, 28 Beav. 535; *Blake v. Barnes*, 12 N. Y. Supp. 69; *Story*, Part. (5th Ed.) Par. 100 and note; *Collier*, Part. (8th Am. Ed.) Par. 162-3 and note; *Hammond v. Douglass*, 5 Vesey, 539; *Crashaw v. Collins*, 15 Vesey, 227; *Kirkman v. Kirkman*, 45 N. Y. Supp. 373; *Hazard et al. v. Caswell et al.*, 93 N. Y. 259; *Caswell v. Hazard*, 121 N. Y. 484.

There is no good will in a Board of Trade business any more than in professional partnerships. 2 *Bates*, Partnership, 668; *Story*, Partnership (5th Ed.), 161; *Collier*, Partnership (6th Ed.), 241; *Farr v. Pearce*, 3 Madd. 78; *Spicer v. James*, Rolls M. & T. (1830); *Davies v. Hodgson*, 25 Beav. 127; *Stuart v. Gladstone*, L. R. 10, Ch. Div. 656; *Austen v. Boys*, 2 DeG. & J. 626; *Mandeville v. Harmon*, 42 N. J. Eq. 192; *Tierney v. Klein*, 67 Miss. 173; *Rice v. Angell*, 73 Texas, 350.

MR. JUSTICE WINDES delivered the opinion of the court.

As to the first question made by appellant, that there was a good will which was an asset of the partnership, there is an apparent conflict of authority. On the question of fact as to whether or not, under the evidence, there was a good will of the firm of F. G. Logan & Co., different conclusions might be reached by reasonable and fair-minded persons. After a careful consideration of the evidence, we can not say that the finding of the learned chancellor on this question of fact is manifestly contrary to his conclusion that there was in fact no good will. This being so, it is the duty of a court of review not to disturb the decree upon this point. *Delaney v. Delaney*, 175 Ill. 188; *Biggerstaff v. Biggerstaff*, 180 Ill. 407.

The Supreme Court of this State, in the case of *Farwell et al. v. Huling*, 132 Ill. 119, gives the following definition of good will: "The good will of a partnership may be defined as every possible advantage acquired by the firm in carrying on its business, whether connected with premises, or name, or other matter."

In 2 *Lindley on Partnership*, *439, the author says:

"The term good will can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that connection and improve it. Upon the sale of an established business, its good will has a marketable value, whether the business is that of a professional man or of any other person."

In *Mechem's Elements of Part.*, Sec. 87, the author quotes part of the above language from Mr. Lindley, and also the definition of good will as given in *Story on Part.*, and further gives the definition of good will by Lord Eldon, viz., "The good will of a trade is nothing more than the probability that the old customers will resort to the old place," and says that this definition is approved by Mr. Parsons in his work on partnership.

In *Story on Part.*, Sec. 99, (7th Ed.), the author says:

"Good will may be properly enough described to be the advantage or benefit which is acquired by an establishment

beyond the mere value of the capital, stock, funds or property employed therein in consequence of the general public patronage and encouragement which it receives from constant or habitual customers on account of its local position or common celebrity, or reputation for skill or affluence or punctuality, or from other accidental circumstances or necessities, or even from ancient partialities or prejudices."

The author then proceeds to discuss different instances of the good will of different kinds of partnerships, and says further:

"It seems that good will can constitute a part of the partnership effects or interests only in cases of mere commercial business or trades, and not in cases of professional business, which is almost necessarily connected with personal skill and confidence in the particular partner."

In *Parsons on Part.* (3d Ed.), 286, the author says, in speaking of good will and the difficulty of giving a definition thereof, that a distinction has been taken between the interest of a partnership resting on the contracts of the firm with a third party and that which has no such foundation; but the author expresses a doubt as to whether this distinction rests on good authority or good reason. The same author, in this connection, says that the definition of good will above quoted from Lord Eldon, "is an exact statement of the legal meaning of good will." The same author also says that a distinction has been taken between "the good will of a partnership in trade and that of a professional partnership. Lawyers or physicians may become partners; but the good will attached to such a firm must be considered more as a personal than as a local thing. It is not a probability that the old customers will go to the old place, but to the same persons, wherever they may be."

In 1 *Collyer on Part.*, Sec. 117, the author recognizes the same distinction that Mr. Parsons does as to good will resting on contracts of the firm with a third party and that which has no such foundation, and says that founded on special contract "is a commodity on which a valuation may be fixed," but as to the other class, no definite allowance can be made for it in case of the death of one partner, except in connection with the premises where the business was

conducted, and the stock in trade. This, the author says, applies solely to a mercantile business. He further says:

“In a business of a professional nature, as that of an attorney or apothecary, the good will attaches to the person, rather than to any other subject. Such part of it as is not personal is so small that equity will not regard it as matter of sale, even where the partnership is without articles. It seems clear, therefore, that upon the death of one partner the good will in these cases will survive to the survivor.”

In 2 Bates on Part., Sec. 668, the author says:

“Good will is not strictly applicable to a professional partnership, for its business has no local existence, but is entirely personal, consisting in a confidence in the integrity and ability of the individual.”

The following cases support the statements of the text writers above quoted, to the effect that there is no good will, except in cases of commercial or trade partnerships, and does not exist in cases of professional business depending on the personal skill and confidence in the particular partner. *Farr v. Pearce*, 3 Maddock's Rep. 74, which was a case of partnership between surgeons; *Arundell v. Bell*, 61 Law J., Pt. 1, 537, a partnership between solicitors; *Austen v. Boys*, 2 De Gex & J. 626, also a partnership between solicitors; *Stuart v. Gladstone*, 10 Law Rep., Ch. Div. 626-57, a case of partnership between India commission merchants; *Rice v. Angell*, 73 Tex. 350, a partnership between insurance agents; *Tierney v. Klein*, 67 Miss. 173-8, also a partnership in insurance agencies; *Mandeville v. Harman*, 42 N. J. Eq. 185, relating to a contract between physicians.

In the *Stuart* case, *supra*, the decision rests mainly upon the construction of articles of copartnership, but the master of the rolls, in considering what was the so-called good will of commission merchants, said he was unable to understand what the good will of a business of that kind could mean.

In the *Austen* case, *supra*, the court say:

“The term good will seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs.”

In the Mandeville case, *supra*, the court, in speaking of good will in the case of a professional business, says: "Professional skill, experience and reputation are things which can not be bought or sold. They constitute part of the individuality of the particular person and die with him."

* * * "The practice of a physician is a thing so purely personal, depending so absolutely on the confidence reposed in his personal skill and ability, that when he ceases to exist it necessarily ceases also, and after his death can have neither an intrinsic nor market value." This was a case of alleged good will based upon contract, but the contract was held to be void, as being in restraint of trade.

In Scudder v. Ames, 142 Mo. 187, 230, which was a partnership in the business of pork packing and commission, the court held that there might in such a business be a good will, but that because the surviving partner was under no obligation to retire from business because of the dissolution of the partnership, it was of no appreciable value, and therefore that the administratrix should not be charged with anything on account thereof.

In Williams v. Wilson, 4 Sand. Ch. (N. Y.) 405, the court held that there was a good will in a business which was in part that of a private asylum for the insane and in part a boarding house for emigrants, and the receiver was directed to sell the lease of the premises where the business was conducted with the good will and the movables which belonged to the institution.

In the case of Webster v. Williams, 62 Ark. 101, the court recognizes the right of physicians who were partners to contract with reference to the good will of their professional business, and holds such a contract to be valid, but does not discuss the question as to whether good will could exist in such a business independent of a special contract.

In Dwight v. Hamilton, 113 Mass. 175, a contract, by which a physician sold his "practice and good will," was held to be valid and binding upon the parties thereto.

Numerous other cases may be found in the books in which contracts with reference to the good will of different lines of business have been upheld and enforced, and we have no

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doubt that good will, as it relates to a business which depends upon the personal skill or confidence of customers in the partners, exists and is a proper subject of contract; but as said by Mr. Collyer: "Such part of it as is not personal is so small that equity will not regard it as matter of sale," except its value is recognized and determined by special contract of the parties.

In *Sheppard v. Boggs*, 9 Neb. 257, the court decreed an accounting including the good will in a partnership between insurance agents. This is the only case to which our attention has been called, or which we have been able to find, in which it has been held that a good will existed as to other than purely commercial or trade partnerships, or which were in part businesses of that nature, except by virtue of a special contract which recognized the existence of such an asset of the partnership.

In the case of *Raymond v. Vaughan*, 17 Ill. App. 144-9, the court, in speaking of a partnership between sugar brokers, says: "The good will was an element of value, and even though there had been a dissolution the appellant might be required to account" (citing cases); but an examination of this case shows that there was no question of good will to be decided, but only an accounting as between the partners as to business done. An examination of the cases cited shows that they do not refer to good will except as connected with a commercial or trade business. As appears from the statement preceding this opinion, the evidence was that the business was largely personal in its nature. Each partner had his particular friends and clients, who confided in him and trusted to his judgment, and therefore gave their business to him, and in many instances the customers were known only to the particular partner with whom they did their business; their names did not appear on the firm books, and they were known to the other partners only by numbers which appeared on their books. We see no reason why there should be a good will to such a business which could exist independent of a special contract, more than in a business purely professional, as in case of a physician or attorney at law. We conclude, therefore, that

as matter of law, under the evidence in this case, there was no good will of which a court of equity would take cognizance in the absence of a special contract.

It follows that there was no error in the exclusion by the chancellor of the evidence offered as to the value of the good will.

As to the lease of the firm office and the wire leases, we are of opinion that the evidence is clearly to the effect that they were of no value, and it would have been a useless thing to have required their sale. The same is true as to the open trades which were not inventoried; and besides we are further of opinion that the estate of Mr. Butters realized far more by the method adopted with regard to these trades than it could possibly have done by their sale.

As has been stated, appellees, after October 10, 1896, did an entirely new business, after having fully accounted with and paid to appellant all the interest of the estate of Butters in the late firm of F. G. Logan & Co., and were under no obligation to account to appellant for the profits of any such new business conducted by them. We think that in this regard the decree of the chancellor was correct.

The decree, however, in requiring appellees to account to appellant for six thirty-seconds instead of one twenty-fourth of the net profits of the business of F. G. Logan & Co. from August 12th to October 10, 1896, was, in our opinion, erroneous. Appellant was only entitled to that proportion of the net profits during this period which the capital contributed by Mr. Butters bore to the whole capital of the firm. His capital was one twenty-fourth of that of the firm. *Holmes v. Gilman*, 138 N. Y. 369-79; *Freeman v. Freeman*, 142 Mass. 98-104, *Robinson v. Simmons*, 146 Mass. 167-76.

The decree of the Circuit Court is in all things affirmed, except as to the allowance to appellant of six thirty-seconds of the said profits from August 12th to October 10, 1896, in which respect it is reversed, with directions to modify it so as to allow appellant one twenty-fourth of such profits. Appellant will pay all costs of the Circuit Court and of this appeal. Affirmed in part and reversed in part.

Hale G. Parker et al. v. Bankers Life Association.

86	815
101	819
101	820
86	815
109	818

1. **MUTUAL BENEFIT ASSOCIATIONS—*Delinquent Members—Cancellation of Certificates.***—Under a by-law of a mutual benefit association, providing that default in payment of an assessment at maturity shall operate to terminate the delinquent membership and to cancel his certificate, without any further act or ceremony, etc., a default in such payment *ipso facto* terminates the membership of the delinquent member and cancels his certificate without any further act or ceremony.

2. **SAME—*When a Formal Declaration of Forfeiture is Not Necessary.***—In a case where the policy is not forfeited by non-payment of premium *ipso facto*, but only so at the election of the insurer, a formal declaration of forfeiture is not necessary, but the forfeiture may be relied on as a defense to an action for the sum insured.

3. **SAME—*Forfeiture Not Waived by Mailing Notice of Assessment After Death.***—There is no element of estoppel in the mere fact that a benefit association mailed a notice of assignment to a delinquent member's former address after he was dead, because in such case no act of his could be induced by the notice, neither can it be claimed that there was any element of contract in the mailing of such notice.

4. **SAME—*Effect of Mailing Notice to Delinquent Member After His Death.***—When a benefit association has no knowledge or notice that a delinquent member is dead, the mailing of an assessment notice to him at his former place of residence is a mere nullity, and gives his representatives no right of action which before they had not.

5. **FORFEITURE—*When a Perfect Defense.***—An adjudication of forfeiture is a perfect defense to notes given to a benefit association for an extension of time to pay his contribution to the guarantee trust fund of such association, whether in the hands of the association or of an assignee after maturity.

Assumpsit, upon a life insurance policy. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 4, 1900.

Statement.—This was an action by appellants against appellee on the following certificate of membership:

"The Bankers Life Association of St. Paul, Minnesota, No. 22,303. Age, 43. Annual dues, \$6.45. Single mortuary assessment 861. This certifies that The Bankers Life Association of Minnesota, upon the written application of Edward C. Lynch, of Chicago, in the State of Illinois, and

upon the statements and warranties therein contained, which application and the answers therein made are hereby made warranties and a part of this contract, has on the 24th day of July, A. D. 1895, admitted him to one full membership in said association, and in virtue thereof he shall participate in and enjoy all the benefits conferred by said association so long as he shall perform the duties and obligations incident to such membership according to the Articles of Incorporation of said association. The said association, in consideration of said application and the answers therein contained, and that said member has made the guaranty deposit and payments called for by said articles, hereby covenants and agrees that said association, after the death of said member and within sixty days after due and satisfactory proof thereof shall have been furnished thereto, will pay at the office thereof in St. Paul, in the State of Minnesota, unto his daughters, Mary F., Drusilla and Annie Lynch, share and share alike if all living; otherwise, this certificate shall become payable and be paid unto the executors or administrators of the estate of said deceased member, in trust, however, for and forthwith to be paid over by said executors or administrators to the heirs at law of said deceased member, the sum of two thousand dollars (\$2,000.00), on the express condition, however, and provided that the statements, matters and answers made, stated and set forth in said application are all true in fact, and upon the express conditions provided that said member shall have paid all the annual dues and mortuary assessments imposed upon him during his life, pursuant to said articles, and said sum to be paid from the mortuary funds of said association, and the deficiency, if any, from the guaranty trust fund thereof, and provided that this certificate shall become null and void if death occurs from self-destruction within two years from this date, said member being sane or insane, or if death shall have been caused by the hand of justice in consequence of the violation of any law; and provided, further, that no action shall be brought or sustained upon or under this certificate unless commenced within one year after the date of the death of said member.

"In testimony whereof, the said corporation has caused the name of its president and secretary to be signed and its corporate seal to be affixed.

{ CORPORATE SEAL
Bankers Life Associa-
tion of Minnesota. }

"CORTLAND H. TAYLOR, President.
"DOUGLAS PUTNAM, Secretary."

The foregoing certificate was issued July 24, 1895.

The cause was submitted to the court without pleadings, a jury being waived, upon a stipulation as to the facts, and the court found for appellee and rendered judgment accordingly, from which judgment this appeal is taken.

The articles of incorporation of appellee are included in the stipulation of facts, and among such articles are the following:

"IV. REQUIREMENTS FOR ADMISSION.

"Any person not less than eighteen nor over fifty-five years of age (counting to his nearest birthday), approved by the medical director of this company, may be admitted to one membership therein upon his application therefor, and upon his depositing with or to the credit of this company the following sums of money: First, as many dollars as he is years of age (counting to his nearest birthday), based upon a membership of \$2,000, or a like proportion upon other amounts, as his deposit in the guarantee trust fund of the association, which fund shall be a pledge to secure payments to be made by this association for death of members, and shall belong to this association. Second, a membership fee equal to half his guaranty deposit. Third, his proportion of the annual expense assessment for the company's current fiscal year.

"Provided, however, that time for the making of said payments, or any of them, may be granted to any applicant, subject to the approval thereof by the board of trustees, but when granted, default made in the punctual payment of such deferred payments, or any of them, at maturity, shall operate to terminate the applicant's membership and to cancel his certificate thereof without any further act or ceremony," etc.

It was stipulated as follows:

"That on the 24th day of July, 1895, said Edward C. Lynch was forty-three years of age; that under Article 4 of said Charter he should, in order to become a member of said association and entitled to any of the benefits of membership therein, have paid to the association the sum of \$43.00 as his contribution to the guarantee trust fund of said association, the sum of \$21.50 as a membership fee in said association, and the sum of \$6.45 as his proportion of the annual expense assessment of said defendant for said defendant's then current fiscal year; that Edward C. Lynch did not, in fact, make said payments or any of them in cash

on said 24th day of July, 1895, or ever or at all, but applied to said defendant for time within which to make said payments; that said defendant did thereupon, with the approval of its board of trustees, grant said Edward C. Lynch further time in which to make said payments; that is to say, said defendant granted to said Edward C. Lynch thirty days from the 20th day of July, 1895, within which to make the payment of \$27.95, on account of said membership fee and the proportion of the annual expense assessment for the company's then fiscal year; and one year from July 24, 1895, within which to make payment of the sum of \$21.50, one-half of the deposit of said Edward C. Lynch in the said guaranty trust fund of said association; and two years from July 24, 1895, within which to make payment of the further sum of \$21.50, the remainder of said Edward C. Lynch's deposit in the guaranty trust fund of said association, subject to and in accordance with the provisions of Article 4 of said Charter and Articles of Incorporation; that said Edward C. Lynch accepted said extensions and agreed to make said payments; that is to say, \$27.95 thirty days from July 20, 1895; \$21.50 one year from July 24, 1895; and \$21.50 two years from July 24, 1895, and thereupon executed and delivered to said Bankers Life Association his promissory notes in writing, signed by him, for said several sums of money, payable as aforesaid, which said notes, and each of them, contained the following provisions: "This note is given upon condition that if I fail to pay said note at maturity then my certificate of membership, 22,303, shall become null and void." No demand was ever made of said Edward C. Lynch for the payment of said note of \$27.95, nor was the same presented for payment to said Edward C. Lynch, nor has the same, or any part thereof, been paid."

That October 31, 1895, Edward C. Lynch died a natural death; that prior to December 26, 1895, appellee had no positive knowledge of his death, but that January 2, 1896, appellee's local agent, at Chicago, was notified that he was dead, and demand was made on said local agent for payment of the amount named in the certificate, but appellee denied all liability on account of the certificate, and refused to pay the same; that neither Edward C. Lynch, nor any one for him, ever paid anything as a consideration for said certificate, or on account of contribution to the guaranty trust fund of appellee, or on account of dues or expenses or

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assessments, nor on any account whatever; but only gave said notes, which notes have been, since their date, and now are, in appellee's possession; that prior to January 5, 1896, appellee had neither knowledge nor notice of the death of Edward C. Lynch; that certain members who were entitled to death benefits having died, appellee, December 1, 1895, passed the resolution for an assessment on account of said benefits hereinafter mentioned, and that December 3, 1895, appellee's secretary mailed to all members of the association a certain notice, a copy of which was addressed to Edward C. Lynch at said date, at his postoffice address, 380 Belmont avenue, Chicago, Illinois. The notice so mailed is as follows:

"Office of the BANKERS LIFE ASSOCIATION OF MINNESOTA,
"ST. PAUL, Minn., Dec. 3, 1895.

"E. C. LYNCH:

"DEAR SIR:—At a meeting of the Board of Trustees of the Bankers Life Association, duly called and held at its office in St. Paul, Minnesota, the following resolution was adopted: 'Whereas, among the death claims established and proved are the following: (Here follows a list of deceased members, showing their former residence, the dates of their deaths, the numbers of certificates held by them and the amounts to be paid to them, respectively.)

"You are day of December, 1895, the members of the Bankers Life Association of Minnesota be and they are assessed hereby severally and respectively assessed two per cent of their respective guaranty deposits on account of each of said claims, to be collected and applied according to the Articles of Association.'

"In accordance with the above resolution you are hereby assessed the following amount hereinafter named and specified, in consequence of such of said death claims as have occurred since your certificate was issued, and you are hereby requested and notified to pay the following sum for the purpose of paying the losses of said association occasioned by the death of its members:

On your policy No. 22,303 4 assessments 86	\$ 3.44
" " " " — — " —	\$ —
" " " " — — " —	\$ —
" " " " — — " —	\$ —
Total	\$ —

"Pay at the Merchants Loan & Trust Co. Bank of your city.

"BANKERS LIFE ASSOCIATION OF MINNESOTA.

"By Douglas Putnam, Secretary.

"The sending of this notice, or payment of the above amount shall not be held to waive any forfeiture or lapse of membership if previous assessments or dues remain unpaid; nor will payment of the above amount re-admit any member in default in consequence of any Guaranty Trust Fund note unpaid at maturity.

"TIME EXPIRES Thursday, January 2, 1896, after which date right to benefits is terminated on all memberships in arrears. To avoid possibility of terminating your membership you are urgently requested to give above notice your immediate attention."

Lynch, as before stated, died October 31, 1895, prior to the time the assessment mentioned in the notice was made, and no part of the assessment was paid on his account. January 2, 1896, appellee's secretary mailed to Edward C. Lynch another notice, addressed as was the former one, which notice is as follows:

"TIME EXPIRES January 2, 1896, on which date right to benefits is terminated on all memberships in arrears.

"FINAL NOTICE.

"THE BANKERS LIFE ASSOCIATION.

"Fire and Marine Building, St. Paul, Minn.

"E. C. LYNCH:

"DEAR SIR—Your December Mortuary Assessment, amounting to \$3.44, (as per notice previously sent you), is payable at

"THIS OFFICE

"On or before Thursday, January 2, 1896.

"Please protect your membership by payment of the same on or before the date named.

"Respectfully yours,

"DOUGLAS PUTNAM, Secretary."

Attached to this last notice was a blank form of application for re-admission as a member of the association, and for a declaration that the applicant is in good health, free from disease and of temperate habits.

Article 11 of the Articles of Incorporation provides, in

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substance, that the mailing of such a notice as the first above mentioned, shall be sufficient service of the notice, and shall constitute a sufficient demand for the payment of the assessment.

MILLER & BLAYNEY and M. P. HATHAWAY, attorneys for appellants.

In order that the forfeiture may be effectual the insurer must, after the alleged non-payment, by some overt act, show that he considers the policy forfeited; and if, with knowledge of the act upon which the forfeiture is predicated, by some such act he shows that he considers the policy to be in force, he will be deemed to have waived the right of forfeiture. Am. & Eng. Ency. of Law, Vol. 28, p. 526; Bishop on Contracts, Sec. 792; May on Insurance, Vol. 20, Sec. 502a; Niblack on Benefit Societies, 246, 305 and 307; Teutonic L. I. Co. v. Anderson, 77 Ill. 384; Olmstead v. F. M. & I. Co., 15 N. W. (Mich.) 82; 50 Mich. 200; Farmers' U. I. C. v. Wilder, 35 Neb. 572; S. C., 53 N. W. 587; People v. Manhattan I. Co., 9 Wend. 381.

SAMUEL E. HALL, attorney for appellee; HOWARD LESLIE SMITH, of counsel.

The insurance in this case terminated upon failure to pay the Guaranty Trust Fund note without any further act or proceeding. Thompson v. Insurance Co., 104 U. S. 252; Sullivan et al. v. Connecticut Ind. Assn. (Ga.), 29 S. E. Rep. 41; Laughlin v. Fidelity Mutual Life Assn. (Tex.), 28 S. W. Rep. 411; Union Central Life Ins. Co. v. Chowning (Tex.), 28; S. W. Rep. 117; Garlick v. Ins. Co., 44 Iowa, 553.

The company was not required to make a demand for the payment of the note, and on refusal to pay, to declare the policy void or to take any other action whatever. U. S. Life Ins. Co. v. Ross, 159 Ill. 476; Dale v. Continental Ins. Co.; 31 S. W. Rep. 267; Schimp v. Cedar Rapids Ins. Co., 124 Ill. 354; Supreme Lodge v. Keener, 25 S. W. Rep. 1084; Ins. Co. v. McMillen, 24 Ohio St. 67.

Unless a waiver contains elements of estoppel, it must

amount to a contract and have a consideration to support it. Ill. Masons' Benevolent Society. v. Baldwin, 86 Ill. 479; Garlick v. Ins. Co., 44 Iowa, 553.

MR. JUSTICE ADAMS delivered the opinion of the court.

The defense relied on by appellee in the trial court is, that appellants' membership in the association became absolutely forfeited by the non-payment of the first note mentioned in the foregoing statement. Appellants' counsel contend, on the contrary, that there was no forfeiture, for support of which position they urge the following reasons: First, that no power to declare a forfeiture is reserved in the certificate of membership; second, that it does not appear from the stipulation of facts, or otherwise, that the articles of association of appellee included in the stipulation of facts were its articles of association July 24, 1895, when the certificate of membership was issued; third, that no demand was made for payment of the notes. Appellants' counsel say that the power to declare a forfeiture is not reserved in the policy itself, meaning the certificate of membership, citing Insurance Co. v. Welsh, 30 Ohio St. 240, in which case the policy contained only the usual forfeiture clause. In this case the certificate or policy expressly refers to the articles of incorporation. After reciting the admission of the deceased to membership, it proceeds thus: "He shall participate in and enjoy all the benefits conferred by said association so long as he shall perform the duties and obligations incident to such membership, according to the articles of incorporation of said association." Also, payment of the death benefit, \$2,000, is stated in the certificate to be "upon the express conditions provided, that said member shall have paid all the annual dues and mortuary assessments imposed upon him during his life, pursuant to said articles." The articles of incorporation are a part of the contract. Palmer v. Welch, 132 Ill. 141; Ry. Conductors' Assn. v. Robinson, 147 Ib. 138; Lehman v. Clark, 174 Ib. 279.

By Article 4 of the Articles of Incorporation, he was re-

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quired to pay before or at the time of his admission, a membership fee, a deposit on account of the guaranty fund, and his proportion of the annual expense assessment for the then current fiscal year.

It is stipulated that under article 4, the deceased, in order to become a member of the association and entitled to any of the benefits of membership therein, should have paid to the association \$43 as his contribution to the guaranty trust fund, \$21.50 as a membership fee, and \$6.45 as his proportion of the annual expense assessment.

By Article 4 of the Articles of Incorporation it is provided that time may be granted for the making of such payments, "but when granted, default made in the punctual payment of such deferred payments, or any of them, at maturity, shall operate to terminate the applicant's membership, and to cancel his certificate thereof, without any further act or ceremony." Time was granted to the deceased to make said payments, which he accepted and executed notes for the deferred payments for the following sums due at the following dates: \$29.96 due August 30, 1895; \$21.50 due July 24, 1896; \$21.50 due July 24, 1897. Each of the notes contained these words: "This note is given upon condition that if I fail to pay said note at maturity, then my certificate of membership 22,303 shall become null and void." Edward C. Lynch died October 31, 1895, two months after the maturity of the note for \$29.95, not having paid that note, or anything whatever, to appellee.

Article 4 being a part of the contract of the assured, it can not be said that the contract does not provide for a forfeiture for non-payment of the deferred payments represented by the notes.

The contention of appellants' counsel that it does not appear that the articles of incorporation included in the stipulation of facts were the articles at the date of the issuance of the certificate is, we think, untenable. It is provided by article 10, in respect to the guaranty fund, that that article shall not be amended or changed, without the consent of every member, to be given in writing, signed by him, etc.

This is the only limitation of the power of amendment, and counsel contend that the article may have been amended since the certificate was issued.

Article 12 is in part as follows:

"TRUSTEES—OFFICERS.

"The officers of this company shall be a president, vice-president, secretary, treasurer, medical director, attorney, and five trustees. The first board of trustees are by the incorporators of this company hereby chosen, and shall be Bruno Beaupre, whose term of office shall be two years; William H. Merriam, whose term of office shall be four years; John B. Sanborn, whose term of office shall be six years; Maurice Auerbach, whose term of office shall be eight years; and Charles H. Bigelow, whose term of office shall be ten years; and each of whom shall continue in office from the first Monday of August, A. D. 1880, until his successor is duly elected or appointed and qualified, and shall reside at Saint Paul, in said State, meanwhile; and permanent removal from said Saint Paul by any trustee hereby appointed or hereafter appointed or elected, shall operate as a formal resignation by him of such offices. All vacancies in said board, whether occasioned by death or resignation, shall be filled by the remaining members of said board; but the trustee so appointed shall continue in office for the unexpired term of predecessor.

"There shall be elected by the members of this company, at the office thereof in Saint Paul, on the first Monday of August, A. D. 1882, and biennially thereafter, one trustee, which election shall be conducted and canvassed according to the by-laws of this company. At any election of trustees hereunder, each member shall be entitled to cast one vote for each full membership, and half a vote for each half membership then held by him."

The 12th is the last of the articles, and is signed by Charles H. Bigelow, William R. Merriam, John B. Sanborn and Maurice Auerbach, four of the trustees named in the articles. It is stipulated that appellee was organized as a corporation March 9, 1895, and the certificate of membership in question was issued July 24, 1895, four months and fifteen days after appellee became a corporation. The fact that four of the first board of trustees chosen by the incorporators signed the articles of incorporation, is evi-

dence from which it may be legitimately inferred that the articles in question are the original articles of incorporation. The conclusion of article 12 provides that the board of trustees shall have power to amend the articles, except as therein otherwise provided, but it is not probable, but is contrary to experience and usage, to suppose that the board of trustees signed their names to an amendment of the articles, or any of them. The usual way of making and authenticating such an amendment is to pass it at a regular meeting of the board, and have it entered in the records of the board meeting by the secretary of the corporation. The provision in each of the notes, that if the deceased should fail to pay the note at maturity, his certificate of membership should become null and void, is substantially the same as that contained in article 4, and is evidence from which it may be inferred that article 4 was in force when the notes were given. It is hardly to be presumed that the assured would have signed notes containing such provision, unless in accordance with his contract. The court, in a proposition presented by appellants' counsel, held that the burden was on appellee to prove that the articles in question were those in force when the certificate issued; therefore the court must have held, and we think was warranted in holding, that such proof was made. Lastly, it must have been understood by the parties to the stipulation of facts that the articles of incorporation included in it were the articles in force when the certificate of membership was issued, because otherwise their insertion in the stipulation was meaningless and of no effect. Appellants, by their attorneys, knowing that such was the understanding of appellee, we are inclined to the opinion that they should not now be heard to contend otherwise.

The non-payment of the first note at maturity, *ipso facto*, terminated the membership of Edward C. Lynch, and canceled his certificate, "without any further act or ceremony." *Order Mut. Aid v. Besterfield*, 37 Ill. App. 522; *Hansen v. Sup. Lodge K. of H.*, 40 Ib. 216; *N. W. Traveling Men's Ass'n v. Schauss*, 148 Ill. 304, 312; *Rood v. Railway*, etc.,

Benefit Ass'n, 31 Fed. Rep. 62; Thompson v. Insurance Co., 104 U. S. 252; Niblack on Ben. Societies, 536, Sec. 289.

In *N. W. Traveling Men's Ass'n v. Schauss*, *supra*, the court say (p. 312):

"Thus in *Ill. Order Mutual Aid v. Besterfield*, 37 Ill. App. 522, and in *Hansen v. Supreme Lodge, etc.*, 40 Id. 216, the provision was that in case of delinquency of the member in the payment of an assessment within thirty days after notice, 'he shall stand suspended,' thus clearly indicating an intention that the delinquency should *ipso facto* work a suspension."

In the present case the articles of association, which are a part of the contract, provide that time may be granted in which to make the payments, "but when granted, default made in the punctual payment of such deferred payments or *any* of them, at maturity, shall operate to terminate the applicant's membership, *without* any further act or ceremony." This language is too plain for construction, even in a policy of insurance.

Even in a case in which the policy is not forfeited by non-payment of premium *ipso facto*, but only so at the election of the insurer a formal declaration of forfeiture is not necessary, but the forfeiture may be relied on as a defense to an action for the sum insured. *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354.

Appellants' counsel contend that the recital in the certificate, "that said member has made the guaranty deposits and payments called for by said articles," estops appellee to deny such payments, citing *Ill. Cent. Ins. Co. v. Wolf*, 37 Ill. 354, and *Prov. L. Ins. Co. v. Fennell*, 49 Ill. 180.

In the former case the court held that the policy having admitted the receipt by the company of the premium it was not competent for the company to prove that it was not paid, but that a note was taken for it. The latter case is to the same effect. We think the present case clearly distinguishable from the case cited. The present case was submitted to the court on a stipulation that none of the notes were paid; that the assured had not paid anything whatever to appellee. The last clause of the stipulation is as

follows: "All right of objection to any matters herein contained for relevancy, competency or otherwise, is hereby reserved to each party hereto." Appellants' counsel made no objection in the trial court to the statement in the stipulation that the assured did not make the payments in question, or any of them, and such objection can not successfully be first made in this court. The only motion of appellants to strike out evidence was a motion to strike out of the stipulation of facts the articles of incorporation, which motion was properly overruled.

It is urged by appellants' counsel that the forfeiture was waived by mailing to the former address of the deceased, after his death, notice of an assessment which was made after his death. There can be no pretense that there is any element of estoppel in the mere fact that appellee mailed the notice to Lynch's former address after he was dead, because in such case no act of his could be induced by the notice; neither can it be claimed that there was any element of contract in the mailing of the notice. *Benevolent Society v. Baldwin*, 86 Ill. 479.

Prior to January 5, 1896, appellee had neither knowledge nor notice that the assured was dead, and the notice mailed December 3, 1895, was, in our opinion, a mere nullity. Appellants, prior to the mailing of the notice on December 3, 1895, had no right of action, because the assured, by his default, ceased to be a member of the association or entitled to any benefit from it prior to his death, so that the contention of appellants' counsel, in the final analysis, is that the act of appellee in mailing the notice to the former address of the assured, he being dead and presumably buried, gave appellants a right of action which before they had not.

Schimp v. Cedar Rapids Co., 124 Ill. 354, was a suit to recover for a loss by fire under a policy issued June 16, 1882. The premium was \$21.50, \$10 of which was paid in cash and a note was given for \$11.50, payable June 1, 1883, which note contained this provision: "This note is given for insurance, and in case of loss under the policy for which

it is given, becomes due and payable on the date of such loss." The loss occurred February 18, 1883; suit was commenced April 12th next after that date, and May 28, 1883, the premium note was paid by the assured through a bank. It was conceded by the assured that the insurance company had a good defense to the action if it had not waived it, but he contended that the company had waived its defense by accepting payment of the premium note. The court, after commenting on the doctrine of waiver, say:

"The doctrine of waiver, however, in our opinion, has no application to the facts of this case. The act of the company relied on as a waiver of its right of defense accrued long after the risk under the policy had terminated by the happening of the contingency insured against."

That there was no intention on the part of appellee to waive anything is evidenced by the statement annexed to and mailed with the notice that the notice "shall not be held to waive any forfeiture or lapse of membership," etc.

Appellants' counsel, in their brief of points, make the objection, but do not seem to rely on it in argument, that "the company should not be allowed to retain the note given in payment of the premium and assess the policy while claiming it to be void." The notes were not received in payment, but merely as evidence of deferred payments, and there was no assessment during the lifetime of the assured, and subsequent to the forfeiture by his default. The return of the notes to the assured was not necessary to enable appellee to insist on the forfeiture by way of defense. The forfeiture occurred solely by reason of the default of the assured, and the contract expressly provides that no act of the appellee subsequent to the default of the assured shall be necessary to effect a forfeiture. The forfeiture having occurred *eo instanti* on the default of the assured, and no subsequent act of appellee being necessary to effect that result, appellee's defense was then perfect, and the retention by it of the notes could not relieve the forfeiture or weaken the defense.

Bane v. Traveler's Ins. Co., 85 Ky. 677, cited in support of appellee's position, is against it. In that case an order

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on a railway company, payable by installments, was given by the assured for the premiums, which order was not paid and which was not returned by the insurance company. The company when sued relied on forfeiture as a defense, and it was objected that the order had not been returned. The court say :

"The only real question, it seems to us, is whether the insurance company was required to return to the insured the order, and notify him that the contract of insurance was at an end, upon peril, if it did not do so, that it should operate as a continuance of the contract."

The court held that the insurance company was not precluded from claiming a forfeiture, saying :

"It was his duty, if he desired to continue the policy, to have paid the installments, and his failure to do so terminated the policy. It is really a misnomer to say that the policy in this instance was forfeited by the non-payment of the premium. The insurance, by the express terms of the policy, ceased because of such non-payment."

Other cases cited by appellants' counsel are not the least in point.

The trial of this case occurred in January, 1899; all the notes were then long past due and were then in appellee's possession, as they had been from the time of their execution. Appellee can not claim a forfeiture and at the same time recover on the notes; *ex. gr.*, a landlord can not insist on a forfeiture for non-payment of rent and still claim the rent for non-payment of which he insists on a forfeiture. *Stuyvesant v. Davis*, 9 Paige, 427.

If one, after a forfeiture or declaration of forfeiture, for non-payment of money, accepts the money, the forfeiture is at an end. It follows that an adjudication of forfeiture is a perfect defense to the notes, whether in the hands of appellee, or of an assignee after maturity. The stipulation is expressed to be of all the facts, and it does not appear that the assured, while living, ever requested a return of the notes, or that since his death there has been any personal representative of his estate to whom they might safely have been tendered or returned.

The judgment will be affirmed.

Women's Catholic Order of Foresters v. Margaret A. Haley.

1. **PRACTICE—Effect of a General Demurrer.**—A defendant, by filing a general demurrer, concedes the truthfulness of allegations of fact which are properly stated in the bill.

2. **SAME—General Demurrer, When to be Overruled.**—A general demurrer must be overruled if any substantial and essential part of the complaint is within the jurisdiction of a court of equity.

3. **BENEFICIARY ASSOCIATIONS—Expulsion of Members.**—A judgment of expulsion made by the lower tribunal of a beneficiary association, when it has no jurisdiction, for want of notice to the member expelled, or for want of authority to entertain the charge brought against him, is to be regarded as void, like a judgment rendered by a court having no jurisdiction over the person or the subject-matter; and in case of the rendition of such void judgment the member affected by it is not bound to take steps to have it reversed in the higher tribunals of the association.

4. **SAME—Proceedings for Expulsion.**—Proceedings for expulsion from a beneficiary association must be in accordance with its constitution and by-laws, to the extent that the member expelled shall have notice, and shall be tried upon a charge within the jurisdiction of the tribunal trying him.

Bill for Injunction.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 2, 1900.

Statement.—Appellee filed her bill of complaint, alleging, among other things, that she is a member of a subordinate court of the Women's Catholic Order of Foresters, an incorporated fraternal beneficiary society, organized under the laws of Illinois; that she holds an endowment certificate from the high court of said order for \$1,000; that her dues and assessments are paid in full, and that there are no charges against her; that she was elected a delegate to the annual session of said order, which convened in Chicago April 26, 1898, and attended as a delegate, representing the court of which she is a member; that said annual session has no power or authority under the laws of said order, and no original jurisdiction under its constitu-

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tion, to sit as a trial court or expel a member; that at a session held April 29, 1898, in her absence, she was declared expelled from membership and her insurance in the order declared forfeited; that under the constitution and by-laws every member of the order is entitled to a trial for every offense before the penalty of expulsion can be pronounced; that no charge of violation of the laws of the order was made against her, and she never had any trial; that she was declared expelled in her absence and without her knowledge, by the high chief ranger, then presiding over the convention, upon a vote of said annual session taken upon a motion to that effect, and has been so declared expelled by said annual session and by the high court in violation of and notwithstanding the laws of said order; that she has exhausted every remedy provided by law within said order to have her rights protected and membership restored, without avail, and that it is now the purpose of the high court of said order to publish among all the courts of the order, numbering 260, a notice of the expulsion of said complainant from said order. Complainant states that she has been engaged as a teacher in the public schools of Chicago fifteen years, has always enjoyed a good reputation and a large salary, and is well and favorably known in educational circles; that such publication among 17,000 members in Chicago and others in the United States will work her irreparable wrong and injury. She prays, therefore, for an injunction restraining the said appellants, the Women's Catholic Order of Foresters, its high chief ranger and high secretary, from publication of the notice of expulsion among the subordinate courts and members, or from taking any further proceedings therein, and asks the court to decree that the acts and proceedings taken to expel her and deprive her of her insurance are null, void and of no effect; "and further decree and find that your oratrix is a member of said order in good standing, and entitled to all the rights and privileges of such a member."

A temporary injunction was issued in accordance with the prayer of the bill.

Appellants entered their appearance, and filed general demurrers to the bill. A hearing was had upon the demurrers, which were overruled. Appellants having elected to abide by their demurrers, a final decree was entered, making the temporary injunction restraining the publication of notice of complainant's expulsion permanent, and finding complainant to be "a member of said order in good standing, and entitled to all rights and privileges of a member in good standing, and that her membership therein is, notwithstanding said attempted expulsion, perfect and complete."

From this decree the appeal is prosecuted.

JOHN D. CASEY, attorney for appellants; CHARLES B. OBERMEYER, of counsel.

CANNON & POAGE, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is claimed by appellants that the prayer of the bill is in effect to restore appellee to membership. The language of the prayer is, however, that the court "find that your oratrix is a member in good standing, and entitled to all the rights and privileges of such a member," and the decree finds accordingly. No effort is made in the bill and no order entered, directing the appellants to take any affirmative action to restore membership or reinstate appellee. The prayer is for a finding that notwithstanding the "attempted expulsion," such membership still exists. The decree finds in substance that the proceedings did not have the effect to deprive appellee of her membership in the order. Cases holding that a court of equity has no power to in effect reinstate such member by injunction are not therefore in point. The only restraining order sought is to prevent the sending out of notices of an expulsion which, according to the allegations of the bill, was never legally effected under the laws and regulations of the order itself.

There is language in the bill and in the decree which is not entirely free from ambiguity. The prayer of the bill is,

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and the decree directs, that appellants be restrained from sending out notices of such expulsion, "or from taking any further proceedings of any kind or nature in the matter." We construe this to mean, however, from the context, not that the Order is restrained from proceeding regularly in accordance with its laws and constitution, and in accordance with its usual practice, to try appellee upon proper charges regularly preferred in the same way and to the same extent as any other member, for offenses such as may, under the laws governing the order, warrant discipline or expulsion; but that the force and effect of this part of the restraining order is merely to protect appellee against further proceedings under the attempted expulsion, which was illegal and void under the laws of the order itself.

The bill in this case does not set forth in detail the constitution and laws of the order, and we have no means of knowing from this record what the actual powers of the annual session are. It is alleged, however, that they do not include the authority which was sought to be exercised, and it is said that no such power existing, it is not possible to do more than set up the fact of such non-existence. However doubtful that may be, appellants, by filing their general demurrer, concede the truthfulness of allegations of fact which are properly stated in the bill. It appears that there are no charges of any kind against appellee, and that by the laws of the order she was entitled to a trial for any alleged offense upon charges regularly preferred, which she did not have, and that the attempted expulsion was in her absence and without her knowledge, and by the mere arbitrary vote of a body having no jurisdiction. In *The People v. Order of Foresters*, 162 Ill. 78, on page 83, it is said :

"A judgment of expulsion made by the lower tribunal, when it has no jurisdiction for want of notice to the member expelled, or for want of authority to entertain the charge brought against him, is regarded as void, like a judgment rendered by a court having no jurisdiction over the person or the subject-matter; and in case of the rendition of such void judgment, the member affected by it is not bound to take steps to have it reversed in the higher tribunals of the society. * * * In other words, the proceeding for expul-

sion must be in accordance with the constitution and by-laws of the society, to the extent that the member expelled shall have notice, and shall be tried upon a charge within the jurisdiction of the tribunal trying him."

There is, however, it is said, a distinction between cases where the validity of expulsion is involved in defense to an action upon a benefit certificate, and where the controversy grows out of questions of discipline only. In the latter case it must appear that the remedies provided under the rules of the order, as by appeal, etc., have been resorted to.

Here it is alleged that appellee has exhausted every remedy at her disposal under the laws of the order, but without avail.

It is said the bill of complaint is insufficient, in that it does not set forth the facts upon which the general allegations and conclusions of the pleader are based. That this criticism is well founded as to much of the bill, is, we think, apparent. But there is, we think, in the bill a sufficient statement of material facts to entitle the plaintiff to the relief granted. A general demurrer must be overruled if any substantial and essential part of the complaint is within the jurisdiction of a court of equity. *Brown v. Hogle*, 30 Ill. 119, p. 139. If appellants desired a more specific and detailed statement of facts, they could have demurred specially. Having elected to abide by the demurrer and permitted a decree to go against them on the facts thus admitted, the demurrer must be held to be an admission of the allegations of the bill. *K. & S. R. R. Co. v. Horan*, 131 Ill. 288-305.

Upon the record as it is presented, the judgment of the Circuit Court must be affirmed.

Edward P. Baker v. John A. Prebis.

1. **DAMAGES**—*When an Appeal is Prosecuted for Delay.*—Where the court is of the opinion that an appeal is prosecuted for delay, it is proper to order that the decree be affirmed, and judgment entered against appellant in favor of appellee for damages.

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Baker v. Prebis.

2. **SOLICITOR'S FEES**—*In Foreclosure Suits*.—Where a trust deed makes provision for a solicitor's fee, the object of the provision is to provide for such fee in case the grantor fails to pay the debt, and the liability remains the same, whether the bill to foreclose is filed in the name of the trustee or of the holder of the notes. *Town v. Alexander*, 85 Ill. App. 512, followed.

Foreclosure.—Appeal from the Superior Court of Cook County: the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed January 2, 1900, and judgment entered for \$100 damages.

CHARLES PICKLER, attorney for appellant.

LACKNER, BUTZ & MILLER, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This appeal is from a decree of sale entered in a suit to foreclose a trust deed, in the nature of a mortgage, upon real estate.

The bill was filed by the holder of the notes secured by the trust deed and the trustee was made a party defendant.

In addition to the amount found due for principal and interest, the decree includes, as due to appellee, the sum of sixty dollars for insurance premium paid by him, and one hundred dollars for his solicitor's fees. The appellant is the grantee of the mortgagors and is the owner of the premises, subject to the trust deed.

The only points he makes against the decree are, (1) that the bill was filed by the holder of the notes, and not by the trustee, or by joining him as a party complainant; (2) that the evidence was not sufficient as to appellant to justify the finding that the insurance premium of sixty dollars was due; and (3) that it was inequitable as against appellant, to allow one hundred dollars for solicitor's fees. There was no error in such respects.

The cases of *Town v. Alexander*, 85 Ill. App. 512, *Springer v. Cochrane*, 84 Ill. App. 644, and *Hough v. Wells*, 86 Ill. App. 186, furnish all the answer that is needed to the first and third points. And as to the second point, the

cases of *Baker v. Jacobson* (No. 8231, filed June 29, 1899) and *Baker v. Aalberg* (No. 8232, filed June 29, 1899), the facts there being substantially the same as here, are decisive. The decree seems to be in all respects correct and proper, and should be affirmed.

Appellee's motion, that in case the decree should be affirmed in whole, judgment in his favor and against the appellant for ten per centum upon the amount of the decree of the Superior Court, should be entered, and execution awarded therefor, was taken under advisement, and now claims our attention.

This court has recently held that it has the power to give judgment in accordance with the motion, in cases where it is of opinion an appeal is prosecuted for delay. *Town v. Alexander*, 85 Ill. App. 512; *Hough v. Wells*, 86 Ill. App. 186. And such holdings are the law for this court, notwithstanding *Baker v. Jacobson*, *supra*, and *Baker v. Aalberg*, *supra* (lately called to our attention), where the power is denied; and being of opinion that this appeal is prosecuted for delay, it is ordered that the decree be affirmed, and judgment entered against appellant in favor of appellee for one hundred dollars, being a sum less than two per centum on \$5,179.27, the amount found due by the decree of the Superior Court, and that execution issue therefor. Affirmed, and judgment entered for one hundred dollars damages.

Mr. Justice FREEMAN, having participated in the case below, does not take part here.

**Henry L. Frank and Joseph G. Snyderacker, Executors
and Trustees, v. Michael C. McDonald.**

1. *LEASE—Of Premises for Gambling Purposes.*—It is not enough to defeat a lease that the lessee intended to use the premises for gambling purposes, and that the lessor knew that he "wanted" to do so.

2. *SAME—Under Seal, Not to be Changed by Parol.*—A sealed executory contract can not be altered or modified by a parol agreement, and

Frank v. McDonald.

when the plaintiff relies upon a contract, part of which is in writing and part a parol agreement, it can not be enforced, and evidence tending to change or modify the written agreement is not admissible.

Action for Rent.—Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded. Opinion filed January 2, 1900.

MORAN, KRAUS & MAYER, attorneys for appellants.

LAWRENCE P. BOYLE and WALTER A. BRENDENCKE, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court. This suit was brought by appellants to recover from appellee as guarantor upon a written lease. Appellants were lessors and one Charles Williams is named in the instrument as lessee. The guarantee upon the back of the lease is as follows:

“For value received, I hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease, covenanted and agreed, in manner and form, as in said lease provided. Witness my hand and seal the 28th day of April, A. D. 1893.
(Signed) M. C. McDONALD. [SEAL].”

A separate guaranty also upon the back of the lease, and identical in its wording with the preceding, is signed as follows:

“John McGillen, [Seal]. John McGillen, Chairman of Cook Co. Dem. Cen. Committee, [Seal].”

The suit was defended upon the ground, first, that it is alleged the lease was actually made to and intended for the said Williams, and guaranteed for him, but possession thereunder was actually given to, and rent accepted from, the Democratic Central Committee, to the wrongful exclusion of Williams; and second, that the lease was made to Williams for gambling purposes, and therefore no recovery could be had thereon.

It is contended on the part of appellants that Williams

was in fact a mere figurehead, in whose name the lease was taken for the committee, at the instance of appellee, who, it is claimed, negotiated and guaranteed the lease, understanding perfectly the exact situation in this respect. It is also claimed that McGillen, as president of the committee, likewise guaranteed the lease with the same knowledge and for the same purpose. A jury returned a verdict in favor of appellee.

It is the contention of appellants that the judgment is contrary to the evidence, that the court should have directed a verdict in favor of appellants as requested, and that there was error in giving and refusing instructions. The evidence is irreconcilably contradictory. It might be entertaining to review the various criticisms made upon the testimony and some of the testimony itself, but it would scarcely be instructive; and in view of the conclusion we are compelled to reach, we must refrain from comments upon the testimony which might prejudice a new trial.

The following instruction was requested by appellants, but refused, and the refusal of the court to so instruct the jury is urged as error:

"If you believe from the evidence that all the parties to the lease here sued on, at the time of its execution by them, intended and agreed that it should be a lease for the Democratic Central Committee, and that such committee should occupy the premises described in said lease during the term thereof, and that pursuant to such agreement said committee did occupy said premises during said term, then the court instructs you that it is your duty to find a verdict in favor of the plaintiffs unless you believe, from a preponderance of all the evidence, not only that Williams, at the time said lease was made, intended to put the premises to a use forbidden by law, but also that the plaintiffs, in making the said lease, knew of the said illegal intent on the part of Williams, and the law casts the burden upon the defendant, McDonald, to prove such intent and knowledge."

It is said that this instruction should have been given, and that it is proper to show by oral evidence that the lease was made for the benefit of a person other than the lessee. 1 Wood on Landlord and Tenant, par. 300, p. 365.

It is, however, claimed by appellants that the question involved in this case is not as to the right to sue the committee as a principal; that Williams, the lessor named, is liable as principal, but that it is proper to show that he executed the lease with the intention, purpose and agreement that the premises should be occupied as they were by the committee, and that the occupation and use of said premises by the committee was not a wrongful exclusion of Williams, but in fact his own act, having been done by and with his consent and the consent of all parties, including appellee as guarantor. The defense of appellee to this, as stated by his counsel in their brief, is that "after having accepted rent from the committee without Williams' consent and over his protests, as the proof clearly shows, that they, the appellants, are estopped from claiming rent from Williams or from the defendant, who guaranteed the lease in behalf of Williams." This contention raises a distinct issue of fact, whether appellants did or did not "accept rent from the committee without Williams' consent and over his protests;" whether, in other words, Williams was wrongfully excluded or whether such occupation and payment of rent by the committee was with Williams' express consent, intention and agreement, and that of the guarantor. Proof was submitted by both sides on this issue, and it is apparently sought to be covered by the first part of the refused instruction.

It is undoubtedly true, as claimed by appellee's counsel, that "a sealed executory contract can not be altered, changed or modified by parol agreement." If it be true that appellants are relying on a contract in this case, part of which is in writing and part a parol agreement, then it can not be enforced, and evidence tending to change or modify the written agreement is not admissible. *Alschuler v. Schiff*, 164 Ill. 298-302. But proof tending to show that Williams, the lessee, himself let in the committee and authorized acceptance of rent by appellants from the committee, as and for himself, would not be inadmissible.

The language of the instruction asked for is at least am-

biguous in that respect and was, we think, properly refused. The lease is not by its terms made to the Democratic Central Committee, and evidence that it was so intended and agreed would tend to prove a new and different parol agreement and could not be considered by the jury. The clause in the instruction "that it should be a lease *for* the Democratic Central Committee" is capable of about the same interpretation and is at least open to criticism from ambiguity. Evidence that all parties, including the lessee, Williams, agreed that Williams could and would let in the committee to use the premises and pay the rent for him, might make a different case; at least it would not be ambiguous.

The third instruction given for the appellee is as follows:

"The court instructs the jury that although the lease sued on may contain express covenants against using the premises for gambling purposes, still if you believe from the evidence that the lessee, Williams, intended to use them for that purpose, and the plaintiffs knew at and before the time of the execution of the lease said Williams wanted or intended to use the premises for gambling, then the plaintiffs can not recover, and you should find for the defendant."

This instruction is fatally defective, and its defense is not attempted by counsel for appellee. It is not enough to defeat the lease that Williams should have intended to use the premises for gambling purposes, and that appellants knew that he "*wanted*" to do so. Appellants might have known that Williams intended to so use the premises, and for the purpose of preventing him from carrying out such intention inserted the express covenants against it and intended to enforce them, and told him so. The question at issue here is not what Williams "*wanted*," but whether in fact the premises were rented to Williams to be used for gambling purposes.

For the error in giving this instruction the judgment of the Circuit Court must be reversed and the cause remanded.

Lieb Sroelowitz and Anna Sroelowitz v. Friedrich Schultz.

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1. **FRAUD—When One of Two Parties Must Suffer.**—When one of two or more innocent persons must suffer loss, the consequence must ultimately rest upon him whose conduct has made it possible for the loss to occur.

2. **EQUITY—Will Not Postpone the Interests.**—Equity will not postpone the interest of one who has omitted no duty devolving on him to the interests of another whose negligence has made it possible for a loss to occur.

3. **MORTGAGE—Not Assignable at Law.**—A mortgage or trust deed is not assignable at law, but an assignment of the notes thereby secured is, in equity, an assignment of such mortgage or trust deed, and a clear distinction exists in this respect between a negotiable note purchased and assigned in good faith, and the mortgage or trust deed by which such note is secured. The former passes free from all equities between the parties, and the holder of the legal title may enforce payment in a court of law; but the latter, not possessing the attributes of negotiable paper, is assignable only in equity, and subject to the equities between the original parties thereto.

4. **SAME—Duty of Assignee to Give Notice.**—It is the duty of the assignee of a mortgage to give to the mortgagor notice of the assignment, not only to ascertain what, if any, defenses exist, but also to protect himself against *bona fide* payments made thereafter by the mortgagor.

5. **SAME—Rights of the Assignee—Notice.**—The purchaser of a mortgage takes it subject to all the infirmities to which it is liable in the hands of the assignor. Every defense which the mortgagor or his representatives could have made against the mortgagee will be allowed in a court of chancery against an assignee of a mortgage or trust deed who has not given notice of the assignment to the maker, for the reason that it is the duty of a purchaser of a mortgage to make inquiry of the mortgagor if there be any reason why the obligation should not be paid.

6. **SAME—As Between the Mortgagor and an Assignee.**—A mortgage is a chose in action as between the mortgagor and any subsequent assignee, subject not only to the state of accounts between the mortgagor and mortgagee at the time of the assignment, but to all payments made to the mortgagee at any time before actual notice of the assignment.

7. **SAME—What the Assignee Takes.**—An assignee takes a mortgage subject only to the equities residing in the original obligor, and not to latent equities residing in some third person against the assignor, of

which the assignee has no notice, such, for example, as a *cestui que trust*. But the reason for this does not apply to a representative of the mortgagor, although he may be a subsequent grantee.

8. *SAME—Duties of the Mortgagor.*—It is the duty of the mortgagor, and equally so of his grantees, in dealing with the mortgagee, to exercise that care and prudence which an ordinarily prudent person exercises in the transaction of business.

9. *MAXIM—In Equity.*—Equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just in itself.

Bill to Foreclose a Trust Deed.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Reversed and remanded with directions. Opinion filed January 2, 1900.

Statement.—This is a bill to foreclose a trust deed and set aside an alleged fraudulent release thereof by the trustee.

The trust deed in controversy was executed February 14, 1891, by one John C. Krasa, to secure his note for \$4,500, due five years after date, together with ten interest coupons, the principal note and coupons being payable to the order of the said Krasa, and by him indorsed in blank. The note and interest coupons were all payable at the office of Theodore H. Schintz, who was the trustee named in the trust deed.

About a month later, the 14th or 15th of March, appellee, Schultz, purchased at their face value, and received from said Schintz, the notes and trust deed in question. No notice of the transfer was given to Krasa, the maker.

The 7th of May following Krasa sold the property to one Joseph Mueller, subject to the said trust deed, Mueller assuming and agreeing to pay the notes thereby secured. In February, 1892, Mueller sold and conveyed the same property to appellants, subject, as before, to the original trust deed now in controversy, and the purchasers assumed and agreed to pay the principal and eight remaining interest notes. Said interest notes were thereafter paid to Schintz, by whom the said loan was originally made, and at whose office they were payable as they respectively became due.

Schultz, the purchaser and assignee of the notes, was in the habit of taking the interest coupons to and leaving them with Schintz as they were about to mature, respectively, receiving the latter's check in payment. Appellants usually received notice from Schintz stating when the interest notes would be due, and that they were payable at his office. Schintz always had the coupons on hand and always delivered them to appellants as they were paid, and the latter supposed Schintz to be, as he said he was, the owner of the notes and trust deed.

Appellee, Schultz, never gave notice of his purchase or ownership of the notes and trust deed, either to Krasa, the original maker, or to appellants. So far as appears, no one but himself and Schintz had knowledge of Schultz's interest until after the principal note had matured and been released of record by Schintz as trustee. It is conceded by all parties to the record that Schultz never knew Krasa nor the appellants, and never had any transactions in person with either of them in connection with the trust deed or notes.

Appellants came from Russia less than a year before they purchased the premises in controversy. They were ignorant of the English language, which they could neither speak, write nor understand.

In August, 1895, appellants were notified by Schintz that the principal note would become due in about six months. In November following they went to Schintz and told him they would not be able to pay the \$4,500 note in full when it matured, but could pay \$800. Schintz thereupon told them they could pay this sum and execute a new mortgage and note for the remaining \$3,700. Accordingly, December 4, 1895, following, appellants went to Schintz's office, paid him the \$800 and executed a new note for the remaining \$3,700, together with a new trust deed upon the property in controversy, to secure the same. At the time this payment was made and the new note executed appellants asked Schintz to cancel the old note and mortgage by drawing a line across it "as they do in Europe," and to give the

papers to them. Schintz replied, telling them in German that such was not the custom here, that the old note and mortgage were of no use and he would destroy them. He produced thereupon certain papers apparently resembling the old note and trust deed which it is now sought to foreclose; told appellants they were the original papers; proceeded to tear them up, and threw them in the waste basket, notwithstanding appellants' request that he deliver said papers to them. Appellants then asked him for a "clearance paper." He told them he would make out a release deed and file it of record. This he subsequently did about February 19, 1896, more than two months thereafter, but not until he had been repeatedly urged to do so by appellants.

The original note for \$4,500 became due on or about February 14, 1896, and at or about that time appellee, Schultz, took the trust deed and note to the office of Schintz and asked for the money. He was told by Schintz that Krasa, the maker, whose obligation appellants had long before assumed and agreed to pay, was unable to pay at that time, but was about to make a new loan for the purpose; that Schultz would have to keep the papers and let the matter stand half a year longer, and that it was perfectly good. Appellee was not aware that Schintz, as trustee, had released the trust deed of record until more than a year after such release was recorded.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellants.

It is the duty of the assignee of a note secured by a mortgage to give notice of the assignment to the mortgagor, not only to ascertain what, if any, defenses exist in favor of the mortgagor, but also to protect himself against any *bona fide* payments made to the mortgagor by the mortgagee. *Towner v. McClelland*, 110 Ill. 542; *McAuliffe v. Reuter*, 166 Ill. 499; *Buehler v. McCormick*, 169 Ill. 275.

The assignee of a note secured by a mortgage takes the mortgage subject to all defenses existing in favor of the mortgagor or his assignee against the mortgagee up to the time of the notice of the assignment. *Olds v. Cummings*,

31 Ill. 188; Walker v. Dement, 42 Ill. 279; Summer v. Waugh, 56 Ill. 531; McAuliffe v. Reuter, 166 Ill. 499; Buehler v. McCormick, 169 Ill. 275; Hortsman v. Gerker, 49 Pa. St. 288.

The mortgagor is justified in dealing with the mortgagee, unless notified of an assignment. Any *bona fide* payment for the full amount of the mortgage made by the mortgagor to the mortgagee will discharge the mortgage. Towner v. McClelland, 110 Ill. 551; McAuliffe v. Reuter, 166 Ill. 499; Beuhler v. McCormick, 169 Ill. 275; Goodale v. Patterson, 51 Mich. 535; Ingalls v. Bond, 66 Mich. 338; Johnson v. Carpenter, 7 Minn. 183; Hortsman v. Gerker, 49 Pa. St. 288.

If the assignee allow the mortgagor to believe that the mortgagee is still the owner and holder of the note secured by the mortgage, and the mortgagor pays the amount of the mortgage to the mortgagee, the assignee is estopped from denying the authority of the mortgagee to accept such payment and release the mortgage. McCabe v. Farnsworth, 27 Mich. 52; Jones on Mortgages, Vol. 1, Sec. 791 (3d Ed.).

The trustee named in the trust deed may be the owner and holder of the note secured by the said trust deed. Bloom v. Van Rensselaer, 15 Ill. 507; Foster v. Latham, 21 Ill. App. 165; Darst v. Bates, 95 Ill. 513.

Where a blind person or an illiterate person has a written instrument falsely read to him, the reader misreading it to such degree that the instrument is of a nature altogether different from the instrument pretended to be read, then there is no negligence on the part of the person to whom the instrument is being read in accepting it as it was read. Puffer v. Smith, 57 Ill. 527; Rockford, etc., v. Schunick, 65 Ill. 223; Schaper v. Schaper, 84 Ill. 603; Van Brunt v. Singley, 85 Ill. 281; Clark on Contracts, 292.

Equity looks upon that as done which ought to have been done. Bispham Eq. Jur. 63; 1 Story Eq. Jur. 51.

ARNOLD TRIPP, attorney for appellee.

The statute makes the recording of deeds notice only to

subsequent purchasers, and in order to affect the right of a prior mortgagee the subsequent purchaser must give notice of the transfer to the prior mortgagee. *Boone v. Clark*, 129 Ill. 466; Secs. 30 and 31, Chap. 30, Hurd's R. S. 1897; *Hosmer v. Campbell*, 98 Ill. 572; *Iglehart v. Crane*, 42 Ill. 261; 2 *Jones on Mortgages*, Secs. 16 and 24; *McMillan v. McCormick*, 117 Ill. 79.

Upon a bill to foreclose a released mortgage the only question is: Has the debt been paid? The release having been made without the consent of the holder of the notes, the fact that there was a consideration or that the release deed was delivered is of no consequence. *Stiger v. Bent*, 111 Ill. 328; *Keohane v. Smith*, 97 Ill. 156.

The assignee of a note and mortgage takes it subject only to those equities which exist in favor of the mortgagor at the time of the transfer and not as to equities existing in favor of third parties. *Olds v. Cummings*, 31 Ill. 189.

The mere fact that one collects the interest does not tend to prove that such person has authority to collect the principal note, or that he was the owner of such principal note. *Cooley v. Willard*, 34 Ill. 68; *Stiger v. Bent*, 111 Ill. 326.

The payment of negotiable paper secured by mortgage without demanding the production of the notes is such negligence that, if loss accrues thereby, the courts will place such loss upon parties making such payment. *Keohane v. Smith*, 97 Ill. 156; *Cooley v. Willard*, 34 Ill. 68; *Windle v. Bonebreak*, 23 Fed. Rep. 165.

The rule is that when one of two innocent persons must suffer loss he who, by his negligent conduct, made it possible for loss to occur, must bear it. *Anderson v. Warne*, 71 Ill. 20; *Otis, Adm'r, v. Gardner*, 105 Ill. 436; *Keohane v. Smith*, 97 Ill. 159.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The controversy here is mainly between two parties, one or the other of whom must suffer because of the fraud of a third person.

The principle is that when one of two or more persons

must suffer loss, upon him whose conduct made it possible for the loss to occur must the consequences ultimately rest. *Anderson v. Warne*, 71 Ill. 20-22, and cases cited; *Otis, Adm'r, v. Gardner*, 105 Ill. 436-444. Equity will not postpone the interest of one who has omitted no duty devolving on him to the interests of another whose negligence made it possible for the loss to occur. *Keohane v. Smith*, 97 Ill. 166-160.

In the case before us it is apparent that both appellants and appellee omitted certain precautions, which if observed might have prevented the perpetration of the fraud. If, when appellee, Schultz, purchased of Theodore H. Schintz the note, secured by the trust deed which he now seeks to foreclose, he had given to Krasa, the maker, notice of the assignment, Krasa's grantees might have learned the facts. Schintz would thus have been deprived, probably, of the opportunity of deceiving them by false representations of his continued ownership and possession. At all events, Schultz would have fulfilled his legal obligation. On the other hand, had appellants refused to pay the \$800 and deliver the new note of \$3,700 to Schintz until advised, by some one disinterested and competent to ascertain the real facts, that the originals had been actually produced and canceled, as they appeared to have been, the perpetration of the fraud would have been effectually prevented.

It was the duty of the assignee, Schultz, to give to the mortgagor notice of the assignment, not only to ascertain what, if any, defense then existed, but also to protect himself against *bona fide* payments made thereafter by the mortgagor. A mortgage or trust deed is not assignable at law, but an assignment of the notes thereby secured is in equity an assignment of the trust deed. *Buehler v. McCormick*, 169 Ill. 269-274; *McAuliffe v. Reuter*, 166 Ill. 491-497. A clear distinction exists in this respect between a negotiable note purchased and assigned in good faith, and the mortgage or trust deed by which the note is secured. The former passes free from all equities between the parties, and the holder of the legal title may enforce payment in a court of

law; but the latter not possessing the attributes of negotiable paper is assignable only in equity, and subject to the equities between the original parties thereto. The purchaser of such instrument takes it subject to all the infirmities to which it is liable in the hands of the assignor. Every defense which the mortgagor or his representative could have made against the mortgagee will be allowed in a court of chancery against an assignee of a mortgage or trust deed who has not given notice of the assignment to the maker, for the reason that it is the duty of a purchaser of a mortgage to inquire of the mortgagor if there be any reason why the obligation should not be paid. *Olds v. Cummings*, 31 Ill. 188-192; *McAuliffe v. Reuter*, 166 Ill. 491-496, 497. And this applies equally to a trust deed.

In the case at bar, so far as appears no reason existed at the time of the purchase by and assignment to the appellee in favor of the maker of the trust deed or any one else why the note thereby secured should not be paid. In other words, there were no equities existing against the trust deed in the hands of Schintz, the holder, who stood in the position of mortgagee, at the time he assigned it to appellee. Inquiry of the maker would not have developed any reason existing at that time why the obligation should not be paid, in accordance with its terms, to whoever might be its owner, the original holder or his assignee.

There was still a possibility, however, that the maker, so long as he was without notice of the assignment, might in good faith make payments to the original holder of the trust deed with expectation that they would be applied and indorsed on the indebtedness thereby secured. In such case it has been held the assignee would not be protected under the trust deed in equity. It is said in *Towner v. McClelland*, 110 Ill. 542:

"The equitable assignee, to protect his rights against a payment by the mortgagor to the mortgagee, must give the former notice, actual or constructive, of its assignment. He may place the assignment on record or give notice of the assignment to the mortgagor."

In the case before us the payment intended to apply on

the debt secured by the trust deed was not made by the original mortgagor. It was made by appellants, as subsequent grantees of the mortgagor, they having assumed and agreed to pay the obligation. It is insisted, however, by appellant's counsel, that the want of notice of assignment to the maker of the note and trust deed deprives the assignee of protection also against payments made in good faith to the assignor, not only by the maker, but by the grantees of the maker.

In the present case the original maker of the note is not legally affected, as matters now stand, by the transfer of the trust deed without notice. He may be, by the misapplication of the money intended to have been applied in payment of the note, but of the transfer of the note without notice he can not in any event complain. The note, which was payable to the maker's order and by him indorsed, was negotiable, and passed as commercial paper by the transfer. The want of notice of the transfer is no defense at law against the note for the maker, any more than for any one else. It is only as to the trust deed, which is not assignable at law, that the want of notice could be any protection to the maker against the assignee seeking to foreclose in equity. But Krasa, the maker of the trust deed, has since parted with his interest in the land, and its sale under foreclosure to satisfy the note would cause him neither loss nor injury. He is not, therefore, liable to injury himself, as matters stand, unless, the debt not being satisfied by foreclosure and sale of the land or otherwise, he is compelled at law to pay it in whole or in part.

The question remains, however, whether, when appellants acquired the title and assumed and agreed to pay the debt secured by the trust deed in controversy, the latter became subject as to them to all the infirmities to which it was liable as against the maker, their indirect grantor, irrespective of whether the latter shall be injured or benefited by the transfer without notice.

The argument substantially is, that the assignee not having given notice to the original maker of the assignment of

the trust deed, nor to any one interested in the property for or through him, when appellants purchased they acquired title, with the liability under the trust deed "subject to all the infirmities to which it is liable in the hands of the assignor;" or in other words, subject to all the defenses to which it was then or might thereafter become liable in favor of the original maker until such notice should be given. The payment made to Schintz by appellants was not a payment of a debt of their own making, but a debt upon which the maker of the trust deed was still liable. Appellants had agreed to pay his debt as a part of the consideration for the conveyance. Had the payment to Schintz been made in good faith by Krasa, the original mortgagor, he having no notice of the assignment, there can be no question apparently that such payment would be a defense in equity to the foreclosure of the trust deed. Why should it not be an equally good defense in favor of his representatives, who paid his debt for him to the original mortgagee, whom they had no reason to suppose was not still entitled to receive it? In *Hortsman v. Gerker*, 49 Pa. St. 282-288, it is held that when payment is made under these circumstances, without notice of the assignment and without the presence of the mortgage, the loss, as between the party so paying and the assignee, falls upon the latter. It is said in that case that "the assignment operates as a new contract between the obligor and assignee, commencing upon notice of assignment." Here there was never any such new contract. It is said in *McAuliffe v. Reuter*, 166 Ill. 499 :

"Besides, upon principle, an assignment of a chose in action, other than a negotiable instrument, is not perfect so as to protect the assignee as against equities between the original parties, without notice to the debtor."

In *Johnson v. Carpenter*, 7 Minn. 176, it is held that where the debt is secured by a mortgage on real estate and also by a negotiable promissory note, the mortgage is a chose in action as between the mortgagor and any subsequent assignee, subject not only to the state of accounts between the mortgagor and mortgagee at the time of the

assignment, but to all payments made to the mortgagee at any time before actual notice of the assignment. It is said that by such payments, made after the assignment without notice, the lien is extinguished, the land freed from the incumbrance, and the mortgagee becomes a trustee of the sum paid for the benefit of the assignee. In *Towner v. McClelland*, 110 Ill. on p. 551, it is likewise held that "where a mortgage is assigned, and the mortgagor without notice pays the payee, who has parted with the note, that will discharge the mortgage, and in a suit to foreclose, such payment may be set up in bar of a decree for its foreclosure."

If such is the effect of a payment made to the mortgagee by and for the mortgagor, it is difficult to see why, upon principle, the result should not be the same when the payment is made by a representative and grantee of the mortgagor who is paying the latter's debt for him. It is true that an assignee takes a mortgage subject only to the equities residing in the original obligor, and not to latent equities residing in some third person, against the assignor, of which the assignee has no notice, such, for example, as a *cestui que trust*. But the reason for this does not apply to a representative of the mortgagor, although he be a subsequent grantee.

The case before us is not entirely free from difficulty. There was an omission of legal duty on one side, and a neglect or at least a failure to obtain adequate assurance that the debt was being paid to the real holder upon the other. The failure of appellee Schultz to give notice deprived appellants of all means of learning, except from Schintz, who the real holder of the debt was. Appellee, however, not only failed to give notice of the assignment, but he put it in the power of Schintz to deceive by placing in the latter's hands, regularly for collection, the interest coupons as they matured, with no indorsement or other indication that they were not in fact, as appellants supposed them to be, Schintz's own property. What is said in *McAuliffe v. Reuter*, above referred to, is applicable in the case at bar, sub-

stituting Schintz for Niehoff: "So far from having any information to put him upon inquiry, by finding in the hands of Niehoff his coupon notes, which he paid as they matured, he was justified in the conclusion that the note and trust deed were there also." While it is true that appellants appear to have placed a certain degree of confidence in Schintz, as is claimed by appellee's counsel, the same appears to be true also of appellee. When the principal note was about to mature, appellee showed apparently no less confidence in Schintz, for he accepted the latter's explanation of the delay in payment and assurance that the note was good, without further inquiry, for a very considerable length of time. The equity of appellants is manifestly equal in this respect to that of appellee, and where the equity is equal the law must prevail. *Towner v. McClelland*, 110 Ill. on p. 550. The trust deed not being assignable at law, and the assignee having to rely on a court of chancery to enforce and protect his rights, the court of equity will not enforce it in his favor if it ought not to be enforced in the hands of the assignor, by reason of payment made to the latter in good faith, when the assignee has given and the mortgagor has received no notice of the assignment. "The reason is, that equity will not lend itself to deprive a party of a right which the law has secured him, if such right is intrinsically just of itself." *Olds v. Cummings*, *supra*.

It must not be forgotten that it is the duty of the mortgagor and equally so of his grantees in dealing with the mortgagee to exercise that care and prudence which an ordinarily prudent person exercises in the transaction of business. It is not claimed in the case at bar that there were any facts or circumstances to put appellants on further inquiry than they seem to have made whether the mortgage note had been transferred. There seems to have been no doubt in their minds, and no reason to doubt, that Schintz was, as he claimed to be, the owner of the notes and trust deed. They had never seen the originals, and when Schintz showed them what he told them were the originals they had no reason to suspect and no means of detecting the fraud. They were unable to read, write or speak English,

but could converse in German with Schintz. They did request the production and delivery of the note and trust deed, and were told by Schintz that it was enough if these were destroyed. They were led to suppose that they had seen this done in their presence. They seem to have endeavored to exercise every precaution that seemed necessary, and the only negligence attributable to them is that they believed Schintz's statement, and were deceived. While experience seems to show that it is never safe to take every man's word upon matters of this kind, no matter how trustworthy he may seem to have been, it should not be considered gross negligence to put some faith in our fellow-men where, after several years experience with them, nothing has occurred, as in this case, to put us on guard or inquiry as to their honesty and truthfulness. In this respect the case differs materially from *Keohane v. Smith*, 97 Ill. 156, which appellee's counsel insist is decisive in favor of appellee.

In that case no inquiry was made before payment to the mortgagee whether the latter "was still the holder and could rightfully received payment, and not to do so was gross negligence." It is said in *Buehler v. McCormick*, 169 Ill. 269-276, "it is apparent that all that has been said in the different cases can not be fully reconciled;" but *Keohane v. Smith* seems to turn upon the negligence of the mortgagor and agent of the second mortgagee in not observing "the usual care that an ordinarily prudent person observes in the transaction of his own business." Thus it was said by Mr. Justice Dickey, in his separate opinion in *Ogle v. Turpin*, 102 Ill. 148, that in *Keohane v. Smith* "the second mortgagee in substance undertook to pay the debt in the first mortgage, and by her own negligence paid the wrong man." That case is also distinguished in *McAuliffe v. Reuter*, *supra*, and appears to be practically ignored, if not in effect overruled, in *Towner v. McClelland*, *supra*.

The equity of the appellee in the case at bar, being in no way superior to that of the appellants, the principle is applicable as stated in *Olds v. Cummings*, 31 Ill. on p. 193, the leading case upon the subject:

"The right of an assignee to set at defiance a defense which could be made against the assignor is an arbitrary statutory right, created for the convenience of commerce alone, and must rely upon the statute for its support; and is not fostered and encouraged by courts of equity."

It is said in *McAuliffe v. Reuter*, *supra*:

"If the assignee would protect himself he should give notice of the assignment to the debtor. If the business of the commercial world requires that mortgages shall pass, with the negotiable paper secured by them, free from the infirmities of non-negotiable contracts, the general assembly has full power to so provide."

We are of opinion that the bill to foreclose the trust deed in question can not be maintained. The judgment of the Circuit Court must therefore be reversed, and the cause remanded with directions to dismiss the bill for want of equity.

Henry Neil et al. v. Frederick Oldach.

1. **APPEALS**—*From an Interlocutory Order of Injunction.*—No prayer for an appeal, and no order of the court allowing an appeal from an interlocutory order granting an injunction, is necessary to enable an appellant to perfect his appeal.

2. **VERIFICATION**—*Of a Bill for an Injunction.*—An affidavit in verification of a bill for an injunction, that "affiant has heard the above and foregoing bill subscribed by him, etc., and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true, and that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately and without notice," is insufficient.

Interlocutory Order, granting an injunction. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1899. Reversed. Opinion filed December 21, 1899.

FESENTHAL, D'ANCONA & FOREMAN, RUFUS S. SIMMONS and FRANK P. BLAIR, attorneys for appellants.

PAYNE & CHAPIN, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

This is an appeal from an interlocutory order of injunction. The order was entered upon *ex parte* application, and upon no other showing than the bill of complaint, and affidavit purporting to verify the same.

But two questions are presented upon this appeal; the first, by a motion of appellee to dismiss the appeal, and the second upon the contention of appellants that the injunction was improvidently issued because of insufficient verification of the bill of complaint.

The motion of appellee to dismiss the appeal is based upon supposed irregularity in the perfecting of an appeal prayed of, and allowed by order of, the Circuit Court. No prayer for an appeal and no order of the court allowing an appeal were necessary to enable the appellants to perfect their appeal from the interlocutory order. *Sidway v. Am. Mortgage Co.*, 67 Ill. App. 24; *Atlas Plumbing Co. v. Alles*, *Idem*, 252; *Com. Vault Co. v. Hurd*, 73 Ill. App. 107; *Hartzell v. Warren*, 77 Ill. App. 274.

It is also contended that the bond is insufficient in form. A bond was given upon this appeal, which was approved by the clerk of the Circuit Court and within the period fixed by the statute. The statute which provides for the taking of appeals from interlocutory orders does not prescribe any precise form of appeal bond. By the terms of the act the giving of an appeal bond by the appellant to secure costs in the Appellate Court, and its approval by the clerk of the trial court, operate to perfect the appeal. The bond given in this appeal and approved by the clerk, recites that appellants "have given notice of their intention to appeal, and have prayed for and obtained an appeal to the Appellate Court," etc. Though the recital contains unnecessary matter, yet the bond does in effect secure the payment of costs in the Appellate Court, and is therefore sufficient.

The motion of appellee to dismiss the appeal must be denied.

The remaining question is as to the sufficiency of the showing made upon which the injunction order was issued. The application was *ex parte*. No evidence was presented in support of the application, and the only ground for the issuing of the order was the bill of complaint and the affidavit purporting to verify the allegations thereof. But the affidavit is insufficient for that purpose, in that it leaves it indefinite as to which allegations of the bill are positively verified and which are stated to be true upon information and belief only. The form of the averments in this affidavit has been before this court several times, and has in each instance been pronounced insufficient. The affidavit is in part as follows: That affiant has heard the above and foregoing bill subscribed by him, etc., and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and that as to those matters he believes it to be true, and that the rights of the complainant will be unduly prejudiced if the injunction is not issued immediately and without notice.

This is not sufficient. *Siegmund v. Asher*, 37 Ill. App. 122; *Brabrook T. Co. v. Belding*, 40 Ill. App. 326; *Heffron v. Rice*, *Idem*, 244; *Stirlen v. Neustadt*, 50 Ill. App. 378; *Werner Co. v. First Nat. Bank*, 55 Ill. App. 321; *North Elec. Ry. Co. v. C., M. & St. P. Ry. Co.*, 57 Ill. App. 409; *Commerce Vault Co. v. Hurd*, 73 Ill. App. 107.

The order is therefore reversed.

Campbell & Zell Co. v. Mahala Ross.

1. EVIDENCE—*Conclusion of Witnesses*.—When the testimony of a witness is a mere statement of his conclusion, it is not sufficient to support a judgment in favor of the party holding the affirmative of the issue on trial.

2. HUSBAND AND WIFE—*Gifts to Wife*.—A transfer of stock in an

Campbell & Zell Co. v. Ross.

incorporated company by a husband to his wife, in consideration of marriage, in accordance with a promise made her before her marriage, in good faith, where the husband is solvent, can not be avoided by subsequent creditors.

3. *STOCK—Transfers by Delivery of Certificate.*—A delivery of a certificate of stock of a corporation by a husband, in good faith, to his wife, as a gift in consideration of marriage, in accordance with a promise made her before her marriage, is sufficient to protect her from attachments against the husband's subsequent creditors, even though there has been no transfer in writing upon the books of the corporation.

4. *FRAUD—Without Evidence of Debt.*—Without evidence of indebtedness due, showing him to be a creditor, one can not raise questions of fraud.

Attachment.—Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed December 19, 1899.

JOHN REID McFEE, attorney for appellant.

JAMES S. CUMMINS, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an attachment suit brought by appellant, a non-resident corporation doing business in Baltimore, against one William A. Ross, a resident of Boston, Massachusetts.

The property attached, consisting of one hundred shares of stock in the Congress Hotel Company of Chicago, is claimed by appellee, who files her interplea in said suit, setting up that at the time of the service of the attachment writ the stock in question was and still is her property; that appellants were aware of that fact, and that the certificates representing said stock had been assigned to her for a valuable consideration, and were in her possession and control, of which appellant had notice.

The case was submitted to the court, a jury being waived. The issues were found in favor of appellee and judgment rendered accordingly. From that judgment this appeal is prosecuted.

The copy of the account sued on, attached to appellant's declaration, shows the alleged indebtedness, to recover which the suit is brought, to be for cash and merchandise. The

only evidence of the existence of a debt from Ross to appellant is the deposition of the president of the appellant company. He states that said appellant "has attached some stock in Chicago for a debt due the company by William A. Ross. The amount of the indebtedness is about \$2,300. I haven't the exact figures up to the present time. There are some matters open yet that will increase this amount still." On the other hand Ross in his deposition states that the appellant company owes him about twenty-five thousand dollars. The evidence is not sufficient to have justified the court in finding in favor of appellant upon the foundation question of the existence of a just claim against Ross, the alleged attachment debtor. The testimony, in the language of appellant's counsel in his brief, shows "that bitter differences existed between the appellant" and Ross. But it only presents, upon one side, a general statement that an indebtedness exists in favor of appellant, and on the other side a claim that such indebtedness exists against appellant and in favor of Ross, against whom the attachment suit is brought. There is not sufficient evidence to support the claim that appellant has a right in law to demand and recover of Ross any sum whatever. The statement of appellant's witness is a statement of his conclusion, and not of the facts upon which the conclusion is based. *McGeoch v. Hooker*, 11 Ill. App. 649-652. There is evidence to the effect that Ross procured the stock in question by or through appellant, but it is conceded that the stock absolutely belonged to Ross, and he testifies that he had paid appellant in full therefor, and "largely in excess."

Appellant's counsel concedes that proof of the relation of debtor and creditor is necessary, where the interpleading claimant proves a transfer valid as between the parties, which it is sought to set aside for actual fraud. But he insists that the transfer to appellee, by her husband, of the stock in controversy was not only actually fraudulent, but that it was void between the parties themselves. It is said in *Yost Mfg. Co. v. Alton*, 168 Ill. 564, that "without evidence of indebtedness due appellant, the appellant can not

raise any question of fraud, it not being shown to be a creditor."

It is urged that appellee has no title superior to the attachment, and no title as between herself and her husband, Ross, the defendant in the suit. The evidence sufficiently sustains her title against him. The substantial point of this contention, however, seems to be that the stock in question was not sold to appellee for a valuable consideration, and is therefore liable to be taken on execution, in accordance with Sec. 52, Chap. 77, Rev. Stat. Appellant, however, has no judgment or execution and could not have under the testimony as it now stands.

As to the consideration for the transfer, there is evidence tending to show that the stock was given to appellee by her husband as a gift, in consideration of marriage, in accordance with a promise made appellee before her marriage. She testifies that he told her she should give him a dollar to make it binding, and that she jokingly did so.

There is no evidence tending to show that Ross was not entirely solvent at this time, nor, as has been said, is there satisfactory proof sufficient to sustain a claim that he was then indebted to appellant. On the contrary the existence of such indebtedness is explicitly denied. Under these circumstances, we know of no reason why he could not make a gift to his wife of the stock in question, valid as against appellant's attachment. There is uncontradicted evidence that the certificates of stock were actually delivered to appellees, and were in her possession a considerable period before this attachment suit was begun, and have remained in her possession ever since. *Crawford v. Logan*, 97 Ill. 396-399, and cases there cited.

It is urged that the stock had not been actually transferred upon the books of the company prior to the attachment. This appears to be true, but it also appears that the company had been three times notified in writing of the transfer of the stock to appellee prior to the commencement of this suit. Her counsel testifies that with the certificates in his possession he went to the company before this suit was

begun, and gave them notice that he represented Mrs. Ross, and desired the stock transferred on the books of the company, subject to another attachment suit then pending. It is conceded also that appellant had notice of appellee's claim as owner, before bringing the present suit. Under these conditions appellee's title must be considered good as against appellant. All that could be accomplished by an actual transfer in the way of notice to all parties concerned, the hotel company and appellant, was attained. It does not appear that appellee was at fault if the company delayed or neglected to make the actual entries completing the transfer. The intention of the statute as it now stands was to give more commercial freedom to transfers of stock, and make them as nearly negotiable as possible; and the delivery of the certificates constitutes under the facts of this case a valid transfer as against appellant. *Rice v. Gilbert*, 173 Ill. 348-353.

The judgment of the Superior Court must be affirmed.

Independent Medical College v. L. C. H. E. Zeigler et al.

1. **EQUITY PRACTICE—*Trial on Bill and Answer.***—When a trial is had upon bill and answer, and no replication filed, according to the uniform rule of practice in a court of equity the answer must be considered as true. The complainant admits that all that is stated in the answer is true, whether it is responsive to the bill or not, and that he has no ground for relief, except the facts which are substantially admitted in the answer to be true.

2. **INJUNCTIONS—*Suggestion of Damages on Dissolution.***—A suggestion of damages in this class of cases takes the place of a declaration, and should be so framed as to give the opposite party information with reasonable certainty of the nature and amount of the damages claimed.

3. **SAME—*What Solicitor's Fees Are Recoverable.***—A defendant may recover, as damages on the dissolution of an injunction, the solicitor's fees which he has paid or become obligated to pay, for services rendered in obtaining a dissolution of the injunction, but not those rendered in the general defense of the suit.

Bill for Relief.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in the Branch

Independent Medical College v. Zeigler.

Appellate Court at the March term, 1899. Affirmed in part and reversed in part. Opinion filed January 2, 1900.

WILLIAM T. BLAIR, attorney for appellant.

W. E. HUGHES, attorney for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This appeal calls in question the correctness of two decretal orders—one dissolving an injunction and dismissing the bill, upon bill and answers, and the other, the assessment of damages awarded upon the dissolution of the injunction.

The bill set up the engagement, for a specified term, of appellee Zeigler, evidenced by a written contract between himself and appellant, and charged certain specific violations of the contract by him and his consequent discharge, the bringing of suits by Zeigler, and the two other appellees at his instigation, against appellant, and alleges special acts of harassment to appellant in connection with such suits.

The prayer of the bill was directed to restraining Zeigler and the two other appellees from instituting further suits against the appellant, and from proceeding any further in such suits as were pending, and for an accounting with Zeigler. A preliminary injunction was granted substantially as prayed.

The defendants severally answered, denying all the material allegations of the bill as to everything upon which the bill could stand, and without any replication being filed by the complainant the cause was by agreement set down for hearing on the merits, upon bill and answers and upon affidavits in support of the motion to dissolve the injunction.

“When a trial is had upon bill and answer, and no replication is filed, according to the uniform rule of practice in a court of equity, the answer must be considered as true.” *Mason v. McGirr*, 28 Ill. 322; *DeWolf v. Long*, 2 Gilm. 679; *Kitchell v. Burgwin*, 21 Ill. 40, *County of Cook v. Great Western R. R. Co.*, 119 Ill. 218.

Upon such a hearing, "the complainant admits that all that is stated in the answer is true, whether it be responsive to the bill or not, and that he has no ground for relief, except the facts which are substantially admitted in the answer to be true." *DeWolf v. Long, supra.*

It necessarily follows, from the rule of equity practice stated, that the bill was properly dismissed, there being no evidence whatever to sustain it, and the answers being admitted to be true.

Subsequently, evidence was heard in support of the suggestion of damages that was filed by leave of court, and an award of \$225 as damages for the wrongful issuing of the injunction was given.

A written suggestion of damages was, by order of court, entered November 1, 1898, filed on that day *nunc pro tunc* as of October 26, 1898, which last day was the date of the entry of the final decree.

It is recited in the final decree that "thereupon the defendants suggest damages, and file their suggestion in writing of the damages by them sustained on account of the issuing of said injunction, and the same being done, * * * it is further ordered that the hearing of the suggestions of damages made by the defendants be continued until November 1, 1898."

Such recitals and order must, we think, be given full effect, as meaning that suggestions of damages in writing, as required by statute, were then on file; and must be held to have furnished all the record data that was required to warrant the court in permitting, by a *nunc pro tunc* order, the supplying of missing written suggestions as of the date of the decree.

The order assessing damages is as follows :

"And said suggestion of damages now coming on to be heard in open court, on the evidence heard in the presence of complainant's counsel, the court does assess the damages occasioned to the defendants (upon the dissolution of the injunction) by a wrongful issuing thereof at the sum of two hundred and twenty-five dollars and awards execution against the complainant therefor."

The suggestions of damages specified, first, the loss of

time from business of each defendant severally, in the preparation of the cause for trial and attending court; and second, "for attorney's fees necessarily required and the expense thereof incurred in preparing this case for trial and in arguing the same before the court on three different occasions."

The only evidence heard or offered in support of the suggestions of damages was in relation to the attorney's or solicitor's fees. The solicitor who appeared for and filed answers for the several appellees and represented them at the hearing, testified that he had no bargain with the defendants (appellees) as to the extent of his fees, and added: "I expect to charge the usual, customary and reasonable fees for the services of lawyers in this class of cases."

Assuming that the testimony of other practicing lawyers who testified as to the value of the services rendered in the cause, upon the hypothesis of services rendered as stated by the solicitor for the defendants, was sufficient to justify the award made, so far as amount is concerned, we can not sustain the order that was entered.

A suggestion of damages, in this class of cases, takes the place of a declaration, and should be so framed as to give the opposite party information with reasonable certainty, of the nature and amount of the damages claimed. *Howard v. Austin*, 12 Ill. App. 655; *Winkler v. Winkler*, 40 Ill. 179; *Stinnett v. Wilson*, 19 Ill. App. 38.

Neither the suggestion that was filed, nor the evidence that was heard in support of it, made any discrimination between services rendered in the cause generally, and those specially rendered in procuring a dissolution of the injunction. The written suggestion is for "preparing this case for trial and in arguing the same." In the solicitor's testimony, it appears that one of the arguments before the court involved the question of multiplicity of suits; another was upon the right of appellant to amend its bill, and the third one, upon a hearing of "the whole case."

"The rule is, that a defendant may recover, as damages on dissolution of an injunction, the solicitor's fees which he

has paid or become obligated to pay, for services rendered obtaining a dissolution of the injunction, but not those rendered in the general defense of the suit. * * * In *Alexander v. Colcord*, 85 Ill. 323, it was held to be serious objection to the evidence in support of a suggestion of damages of this character, that it made no discrimination between services rendered in the case generally, and services which were strictly necessary to procure a dissolution of the injunction." *Lambert v. Alcorn*, 144 Ill. 313.

And it was held in the last cited case that, such discrimination not being made, there was no evidence upon which the assessment of damages could be based, and that the portion of the decree there under review, relating to damages, could not be sustained.

This might perhaps be sufficient for this case, but we may add, the award of damages is, also, too uncertain to be sustained. It is not in favor of anybody. It awards execution against the complainant but does not name any one in whose favor execution should run.

That portion of the decree which dismisses the bill for want of equity at the costs of appellant is affirmed, but the portion assessing damages for the dissolution of the injunction is reversed. The costs of the appeal will be taxed against the appellees. Affirmed in part, and reversed in part.

O. W. Buckingham et al. v. Frederick J. Shoyer, Interpleader.

1. **INTERPLEADER**—*What Judgment Entitled to.*—An interpleader is permitted for the purpose of establishing his title to the property or fund in dispute. The sole issue is the ownership of the property, and if he succeeds in establishing his title to the property or fund, as against the plaintiffs in the attachment, the only judgment he is entitled to is for his costs.

2. **GARNISHMENT**—*Funds in Custodia Legis.*—Funds in the hands of a garnishee are *in custodia legis* immediately on the service of the writ upon him, and from that time he holds the funds as agent of the court and remains in the custody of the law, subject to the determina-

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tion of the court, when the issues or interpleas or other claims shall be made up, of the ownership of such funds.

3. **JUDGMENTS—Subsequently Reversed.**—At common law, when money had been paid on a judgment which is afterward reversed, restitution might be ordered without a *scire facias*.

4. **SAME—Discharge of the Garnishee—Costs.**—When it appears that the money or property in the hands of a garnishee is not the money or property of the defendant in the attachment, the proper judgment is that the garnishee be discharged and that the interpleader recover his costs of and from the plaintiffs in the attachment. In such case the garnishee should also receive his costs.

Garnishment, Interpleader, etc.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed January 4, 1900.

Statement by the Court.—September 8, 1893, appellants sued out a writ of attachment against James Bole for a claim of \$1,279.25, by which Marshall Field & Co. and George P. Gore & Co. were directed to be served as garnishees, which writ was returned by the sheriff no property found and served on said garnishees. There was no personal service on the defendant Bole. He was served by publication only. September 20, 1893, interrogatories to the garnishees were filed, which were answered by Marshall Field & Co. September 20, 1893, admitting indebtedness to Bole, the defendant in attachment, in the sum of \$718.10, and by George P. Gore & Co., admitting indebtedness to Bole in the sum of \$360.70. September 20, 1893, appellee, Shoyer, filed an interplea claiming that the moneys in the hands of the garnishees belonged to him as assignee. Appellee's plea of interpleader was subsequently amended by averring that September 6, 1893, James Bole and wife, by deed of assignment, assigned to him, Shoyer, all his property wherever situated or found, in trust, to dispose of the same and to pay all just demands of his, Bole's, creditors, and also by averring that, by virtue of said assignment, the moneys in the hands of said garnishees belonged to him, Shoyer.

October 6, 1893, judgment was rendered by default in favor of the plaintiff in the attachment suit (appellants

here), and against Bole for the sum of \$1,279.50 and costs of suit, and in favor of Bole for the use of appellants, against Marshall Field & Co. as garnishee, for \$718.10, and against George P. Gore & Co., garnishees, for \$360.70. November 16, 1893, while appellee's interplea was pending, the garnishees paid to appellants the amount for which judgments were rendered against them, as above stated, and November 17, 1893, appellants entered on the record satisfaction of the judgments against the garnishees.

May 27, 1895, appellants joined issue on the interpleader of appellee, a trial was had before the court and a jury in November, 1898, and the jury returned the following verdict:

"We, the jury, find the issues upon the interplea of Frederick J. Shoyer, assignee, for the interpleader, Frederick J. Shoyer, assignee, and find ownership and title to the moneys paid by Marshall Field & Company and George P. Gore & Company to plaintiffs Buckingham and Paulson in said interpleader, Frederick J. Shoyer, assignee."

November 16, 1898, appellee, Shoyer, filed his petition averring the filing of his interplea, the answers of Marshall Field & Co. and George P. Gore & Co., and the judgment rendered as heretofore stated, and averring that appellants, wrongfully and in violation of his rights, collected and received from the garnishees the amounts which they owed, respectively, and that they still hold the same, and praying that he may be adjudged to be the owner of said moneys, and that appellants may be ordered to pay the same to him.

November 30, 1898, the court entered a judgment wherein, after reciting the facts substantially as above stated, it is adjudged that the moneys in the hands of the garnishees at the time of service on them were and still are the property of appellee, Shoyer, and ordering appellants to pay said moneys, amounting to the sum of \$10,078.80, to the clerk of the court for the use of Frederick J. Shoyer, and that said Frederick J. Shoyer have execution therefor. From this judgment this appeal is taken.

REMY & MANN, attorneys for appellants.

Under the statute the judgment must be either that the

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property is in the claimant, and costs of suit, or for costs of suit for the plaintiff in the attachment. (Rev. Stat., Chap. 11, Sec. 29.)

There is no provision in the statute for a judgment *in personam* against the plaintiff in the attachment, except for costs incurred by the interpleader. *Mills v. Thompson*, 61 Mo. 415; *Hewson v. Tootle*, 72 Mo. 632.

The judgment in cases like the one at bar, when the interpleader succeeds, should be that the money in the hands of the garnishees is the money of the interpleader, and for costs against the attachment plaintiffs. A money judgment is not proper. *Hewson v. Tootle*, 72 Mo. 632; *Mills v. Thompson*, 61 Mo. 415; *Com. Nat'l Bk. v. Payne*, 60 Ill. App. 346; *Walton v. D. C. & B. R. Mills*, 37 Ill. App. 264; *Glover et al. v. Wells*, 40 Ill. App. 350; *Carpenter v. McClure*, 37 Vt. 127.

The judgment being that the money in the hands of the garnishees is the money of the interpleader, he must be left to pursue his remedy against the garnishees. *Carpenter v. McClure*, 37 Vt. 127.

The money in the hands of the garnishees having been adjudged to be the money of the interpleader, and such money having been paid to the plaintiffs in the attachment, the interpleader would have his action against the plaintiffs in the attachment for money had and received, and in the event of such a suit being brought, the plaintiffs in the attachment would have the right to set off any claims they might have against the assignee on account of the claim in suit in the attachment proceedings, as well as other claims which may not have been due at the time the attachment proceedings were begun. *Trieber v. Blocher*, 10 Md. 14; *Clark v. Brott*, 71 Mo. 473.

PECK, MILLER & STARR, attorneys for appellee, contended that upon the facts disclosed by the record in this cause the court had authority to enter a personal judgment against the holders of the fund—*Buckingham & Paulson*. 2 Tidd Pr. 1033; *Wells*, Jur., Sec. 145, p. 135; *Winters v. Helm*, 3

Nev. 397; Juilliard v. May, 130 Ill. 87; Darby v. Brown, 8 Price, 607.

The judgment, however, was not a judgment in form, but an order that plaintiffs, who had wrongfully obtained possession of the money in controversy, should make restitution thereof, and pay the same into court or to the owner thereof, and was authorized. Bank of U. S. v. Bank of Wash., 6 Pet. (31 U. S.) 299; Doe v. Thorn, 1 M. & S. 425; Clark v. Pinney, 6 Cow. 300; Darby v. Brown, 8 Price, 607; Ryan v. Burkam, 42 Ind. 597; Shirk v. Wilson, 13 Ind. 129; Juilliard v. May, 130 Ill. 87; 2 Tidd Pr. 1033; Morrison v. New Bedford, etc., 7 Gray, 269; Parmer v. Ballard, 3 Stew. (Ala.), 326; Oppenheim v. Pittsburgh, etc., R. Co., 85 Ind. 471; Ohio, etc., Ry. Co. v. Alvey, 43 Ind. 180; Webster v. Lowell, 2 Allen, 123; Howard v. McLaughlin, 98 Pa. St. 440; Telles v. Lynde, 47 Fed. Rep. 912; Himrod v. Baugh, 85 Ill. 437; Shinn on Attach. and Garn., Sec. 474; same, Sec. 671, and cases cited; Drake on Attach., Sec. 710; Cram v. Shackleton, 64 N. H. 44; Lawrence v. Lane, 4 Gilm. 354; Marsh v. Davis, 24 Vt. 363.

In the exercise of its equitable powers to give effect to and carry out its judgment, the trial court, having adjudged the title and ownership of the fund, in the possession of the plaintiffs in attachment, to be in the interpleader, had jurisdiction to order the return of the money and to award execution therefor.

Courts will not put a party who has been adjudged to be the owner of the *res* to the expense and delay of a separate suit to obtain possession of the same. McDonald v. Moore, 65 Ia. 171; Chittenden v. Rogers, 42 Ill. 99; Watkins v. Cason, 46 Ga. 444; Ryan v. Burkam, 42 Ind. 507; Shirk v. Wilson, 13 Ind. 129; Robinson v. Chesseldine, 4 Scam. 332; Watson v. Reissig, 24 Ill. 284; Mason v. Thomas, 24 Ill. 287.

The garnishees having answered, disclosing the amount of their indebtedness and the receipt of the notice of the assignment to the interpleader, and having asked the judgment of the court as to whom they should pay the same, and having paid the same in pursuance of such judgment,

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were thereby discharged, and Field & Co. were properly dismissed out of the case.

They can not be made to pay their debt twice. Sandberg v. Papineau, 81 Ill. 446; Himrod v. Baugh, 85 Ill. 435; Minard v. Lawler, 26 Ill. 301; Robertson v. Roberts, 1 A. K. Marsh (Ky.), 247; Richardson v. Hickman, 22 Ind. 244; Harmon v. Birchard, 8 Blackf. (Ind.) 418; Wheeler v. Aldrich, 13 Gray (Mass.), 51; Drake on Attach., Sec. 710.

Should, however, this court consider the order or judgment of the trial court, appealed from, erroneous, appellants will not be allowed to retain fruits of their own wrong; nor will appellee be put to the expense and delay of further litigation to obtain the money in the possession of appellants, adjudged by the court below to be owned by appellee, and which ownership is not here controverted by appellants, but this court will, by its judgment, restore to appellee the fund wrongfully withheld. Union Nat. Bk. v. Manistee Lumber Co., 43 Ill. App. 525; Telfer v. Hoskins, 32 Ill. 165; Hadlock v. Hadlock, 22 Ill. 384; Com'l Ins. Co. v. Scammon, 123 Ill. 601; Baldridge v. Dawson, 39 Mo. App. 527; Hardware Co. v. Randall, 69 Mo. App. 342; Boyle v. Carter, 24 Ill. 49; Hart v. Seixas, 21 Wend. (N. Y.) 40; Market Nat. Bk. v. Paf. Nat. Bk., 102 N. Y. 464; Haebler v. Myers, 15 L. R. A. 588; Tomlinson's Law Dict., title "Restitution;" 2 Lil. Abr. 472; Rolle Abr. 778; Western v. Creswick, 4 Mod. 161; Wilkinson's case, Cro. Eliz. 465.

MR. JUSTICE ADAMS delivered the opinion of the court.

The only issues of law in this case are between the appellants and the appellee Shoyer. The question is whether the trial court erred in ordering appellants to pay to the clerk of the court for the use of appellee the moneys appellants had received from the garnishees, Marshall Field & Co. and George P. Gore & Co. This was, in effect, a judgment in favor of appellee and against appellants for the sum of \$1,080.80.

The statutory provision in relation to judgment in cases of interpleader is as follows:

"In all cases where the jury find for a claimant, such claimant shall be entitled to his costs; and when the jury find for the plaintiff in the attachment, such plaintiff shall recover his costs against such claimant." 1 S. & C. Stat., Ch. 11, Sec. 29.

It has been held by this court, in at least three cases, that when the interpleader is successful, the judgment should be in his favor for costs. *Walton v. Detroit Copper & Brass Rolling Mills*, 37 Ill. App. 264; *Commercial Nat. Bank v. Payne*, 60 Ib. 350; *Glover v. Wells*, 40 Ib. 350; see also *Drake on Attachment*, Sec. 460; *Peck v. Stratton*, 118 Mass. 406; *Carpenter v. McClure*, 37 Vt. 127.

In *Glover v. Wells*, *supra*, it was expressly held that a judgment in favor of an interpleader for a sum of money is bad. The right to intervene and interplead in an attachment suit exists only by virtue of the statute, and the statute does not authorize a judgment that the interpleader recover the property in controversy. The object of allowing a third person to intervene as claimant of property, or money garnished, is to protect the garnishees and the intervening claimant; to protect the former against the risk of having to account for the property or the money, as the case may be, to the real owner, in the event that the plaintiff in the attachment is not such owner, and to protect the claimant against the application of his property or money to the payment of the debt of another. He is simply let in for the purpose of establishing his title, if he can, to the property or fund in dispute. The sole issue is whether it is his property, and if he succeeds in establishing his title to the property or fund, as against the plaintiffs in the attachment, the only judgment he is entitled to is for his costs. The question, however, whether the court may order the money paid into court subject to the further order of the court, may become important in further proceedings before the trial court, and therefore may properly be considered here. The situation is this: The funds in the hands of the garnishees were *in custodia legis* immediately on the service of the writ on the garnishees, and from that time the garnishees held the funds as agents of the court.

Drake on Attachment (5th Ed.), Sec. 453a; *Brashear v. West*, 9 Pet. (U. S.) 608, 622; *Shinn on Attachment and Garnishment*, Sec. 46; *Doane et al. v. Keating*, 12 Leigh (Va.), 391, 425.

Appellee's interplea was filed September 20, 1893. It is recited in the judgment of November 30, 1898, that no notice was served on appellants, the garnishees, or their attorneys, of the filing of the interpleader; but the statute requires no such notice any more than does the practice act require notice of the filing of a plea. Appellants were in court by their attorneys, and must be presumed to know the law that a plea of interpleader might be filed, and, when filed, they were bound to take notice of it.

Notwithstanding the judgment of October 6, 1893, the funds in the hands of the garnishees still remained in the custody of the law, subject to the determination by the court, when the issues on the interplea should be made up, of the question whether the funds in the hands of the garnishees belonged to Bole, the defendant in the attachment, or to appellee; and when the appellants, pending the interplea, took the funds from the garnishees and appropriated them to their own use, they took them out of the custody of the law.

In *Darley v. Brown*, 8 Price (Ex. R.), 607, the defendant, Brown, after action commenced, but before judgment, obtained his discharge under the insolvent act, the claim sued on being included in his schedule, notwithstanding which, the plaintiff proceeded to judgment, and collected it by execution. A rule requiring the plaintiff to show why the execution should not be set aside, and the money levied under it restored to the plaintiff, was made absolute. At common law, when money had been paid on a judgment which was afterward reversed, restitution might be ordered without a *scire facias*. 2 Tidd's Prac., Sec. 1033.

After a sale on execution, it appearing that the execution was irregular, it was ordered that the money be returned to the defendant. *Doe v. Thorn*, 1 Maule & Sel. 425; see also *Arrowsmith v. Vanarsdale*, 21 N. J. 471; *Herman on Executions*, Sec. 405; and 4 Wait's Prac. 555, 557.

In the present case the appellants have collected and appropriated to their own use funds in the custody of the law, while the jury have found, and the court, by overruling appellants' motion for a new trial, has also found, that the funds in the hands of the garnishees were not the property of the defendant in the attachment; from which it follows that the appellants could take nothing by their suit in attachment. The court had jurisdiction over the appellants and also over the *res*, the funds in the hands of the garnishees, for the purpose of determining whether the title to the funds was or not in the defendant in the attachment, and we are of opinion that appellants, who were charged with knowledge of all the circumstances stated, acted wrongfully in interfering with the funds in the hands of the garnishees, and that their so doing was an abuse of the judgment of October 6, 1893.

In Juilliard v. May, 130 Ill. 87, the court say (p. 94):

"There is no legal inconsistency or incongruity that the court should render judgment against an attachment defendant, and order a sale of the property levied on by the writ, and, at a subsequent time or term, adjudge such property to belong to a person other than such defendant, and order its release. Such other person would not be bound by the judgment against the defendant in attachment ordering such sale, and would stand in the attitude of a stranger to the record."

We are of opinion that the court may, at any time prior to the rendition of the proper judgment for appellee on the verdict of the jury, compel appellants to pay into court, subject to the further order of the court, the funds collected and received by appellants from the garnishees. The court, however, can not require the funds to be paid to appellee for reasons heretofore stated. If the funds shall be paid into court, on the order of the court, they will, when so paid, belong to the garnishees, and can not be ordered to be paid to appellee, or to any person other than the garnishees, except by consent of the garnishees. When it appears that the money or property in the hands of a garnishee is not the money or property of the defendant in

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the attachment, the proper judgment is that the garnishee be discharged, and that the interpleader recover his costs of and from the plaintiffs in the attachment. In such case the garnishee should also receive his costs.

The judgment will be reversed and the cause remanded.

George B. Haines v. N. J. Downey.

1. LANDLORD AND TENANT—*Fraudulent Concealment by the Lessor.*—If a landlord by artifice or contrivance prevents the intending tenant from discovering defects, or if he fraudulently misrepresents the condition of the premises in some material particular wherein he has special knowledge, knowing that the tenant relies on his representation, and not on investigation or examination, the tenant may rescind the lease, and vacate the building upon discovering the hidden defect, or the falsity of the representation, and he may defeat upon such facts any claim for rent based upon such lease.

Motion for Judgment by Confession.—Error to the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 2, 1900.

F. J. STANDARD, attorney for plaintiff in error.

JUL. H. GEWEKE, attorney for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The assignments of error call in question the correctness of an order of the Circuit Court denying the motion of the plaintiff in error to permit a judgment by confession, entered in pursuance of a power of attorney attached to a certain indenture of lease to stand as security and the cause to be reopened and plaintiff in error allowed to interpose and make a defense.

The lease bears date April 23, 1897, and is for a term of one year, beginning May 1, 1897. Among the recitals contained in the lease is one that the lessee, plaintiff in error,

"has examined and knows the condition of said premises, and has received the same in good order and repair, except as hereon otherwise specified, and that no representations as to the condition of repair thereof have been made by the party of the first part (defendant in error) or the agent of said party."

In support of the motion, the plaintiff in error made affidavit that "subsequent to the time of the making of said lease and prior to the time for the commencement of such occupancy, deponent for the first time learned that said leased premises were uninhabitable, unfit for occupancy and in such a condition as to endanger the health and life of deponent and his family if they occupied the same, by reason of defective water and sewerage connections, causing in times of rainfall the cellar to become overflowed with water, which in its standing condition emitted stenchful fumes and odors which permeated every part of the first floor above so leased; that at the time of such leasing deponent was not aware of and could not discover such condition of such leased property for the reason that said time of said leasing was in the middle of a period of comparative drouth and lack of rainfall; that said plaintiff must have been aware of such condition of said leased property at the time of such leasing, and deponent alleges upon information and belief that said plaintiff had knowledge in fact and was aware of such deleterious and uninhabitable condition of said property, but failed to disclose to, and concealed from deponent such knowledge."

The position taken by plaintiff in error in his briefs, excuses us from discussing any questions except the one of fraudulent concealment by the defendant in error of an inherent, invisible and unobservable defect in the premises of a deleterious nature that rendered them uninhabitable, and entitled the plaintiff in error to rescind the contract of lease.

That the fraudulent concealment by a landlord of a latent and deleterious defect known to him in the premises let by him, would, if the defect were sufficiently serious in consequences, be equivalent to an eviction of the tenant and entitle the latter to rescind the contract of lease, seems too plain a proposition to require the citation of authority. But see Wood's Landlord & Tenant (1st Ed.), 805 and 921.

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And, perhaps, it is not too broad a statement to say that if the landlord knew of a defect in the premises which it was his legal duty to disclose, and concealed it under circumstances making it his duty to disclose it, the lessee would, generally, be relieved from the payment of rent under the lease.

“If a landlord, by artifice or contrivance, prevents the intending tenant from discovering defects, or if he fraudulently misrepresents the condition of the building in some material particular wherein he claims special knowledge, knowing that the tenant relies on his representation and not on investigation or examination, no doubt the tenant may rescind the contract of lease and vacate the building upon discovering the hidden defect, or the falsity of the representation, and may defeat upon such facts any claim for rent based upon the lease.” *Blake v. Ranous*, 25 Ill. App. 486.

But the only showing made in this case of any dereliction on the part of the landlord is that “he must have been aware” of the uninhabitable condition of the premises at the time of letting them, and, upon information and belief, that “he had knowledge in fact and was aware of such deleterious and uninhabitable condition,” and failed to disclose it and concealed it.

Such conclusion and such a statement upon information and belief, of knowledge, generally, with nothing specifically stated, could not be shown in evidence and could not, if proved in the words of the affidavit, sustain a defense to a suit for rent accrued upon the lease.

It may be a hard case, but there is nothing in the record by which we may say the Circuit Court erred in denying the motion, and the judgment will have to be affirmed.

Lake Shore & M. S. Ry. Co. v. Henry C. Petersen.

1. NEGLIGENCE—*Recovery for Personal Injuries—Measure of Proof.*
—In order to entitle a plaintiff to recover for the negligence of a defendant it is essential that there should be evidence tending to prove at

least with reasonable certainty, that the injury was actually inflicted by the defendant.

Action in Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 2, 1900.

PAM, DONNELLY & GLENNON, attorneys for appellant.

ASAY & CLARE, attorneys for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Appellee was a brakeman in the employ of the Chicago and Northwestern Railway Company, and at the time of receiving the injury for which he sued to recover damages was one of a crew of men, all employes of such company, engaged in the act of transferring, by the aid of a locomotive, also belonging to the said Northwestern Company, the special car "Wanderer" from the depot of said company to the yards or depot of the appellant company.

The work was accomplished, and the special car was coupled to a string of passenger cars, belonging to the appellant company, standing by themselves on a track in appellant's yard near its passenger depot. While engaged, as was a part of his duty, in uncoupling the Northwestern locomotive from the special car, something caused the string of appellant's cars, to which the special car had been attached, to be suddenly moved from the further end, thus causing the drawbars of the special car and the locomotive to come quickly and forcibly together, and the appellee's hand was caught between them and badly injured.

We understand the theory of appellee's case, in part, at least, to be that the cars were suddenly moved and the injury occasioned through some improper and negligent act of the appellant, or for which the appellant was responsible. But the point is persistently made by the appellant that the record wholly fails to disclose by what force or agency the cars were moved or caused to be moved, or that the appellant was in any manner connected therewith, or in other

words, the record wholly fails to disclose any negligence by appellant.

This point is sought to be met by counsel for appellee, in their brief, by referring to the testimony of appellee, as follows:

“I do not know what moved the car, only what I heard afterward. I did not see anything strike either end of the train.”

No other evidence whatever is referred to by the appellee as even tending to show what caused the car to be moved, nor can we find any after a most diligent search of the record for it.

True, it is said by counsel for appellee, that “while he (appellee) was so engaged an engine or other agency caused the Lake Shore train to back violently against the ‘Wanderer’ while appellee was still engaged in the act of uncoupling, and thereby he was injured.” But we can not find a word of evidence to sustain the statement, and if there were evidence, in the very words of counsel, it would not, alone, convict appellant of negligence, for it is not said the “engine or other agency” belonged to the appellant, or that appellant was in any way responsible for or connected with it.

And there is the further statement in the brief for appellee that “we must confess we have little patience with appellant’s claim that the record fails to disclose what caused the string of cars to bump violently the car ‘Wanderer.’ A careful reading of the record itself will leave no fair-minded person in doubt upon that.”

While such a statement by counsel, no matter how eminent, can not supply the lack of evidence, we have, with a desire to be included in the class of persons referred to, given “careful reading” to the record with, perhaps, more patience than counsel ought to have required us to maintain in doing work he should have done, but without any of the success he so sanguinely asserts would result from our reading.

The testimony of appellee, as quoted, is the only evidence in the record that has any bearing, directly or by inference,

upon the question of what force or agency caused the cars to be moved. If we might guess that the string consisting of several cars could only have been moved, in the ordinary course of things, by the power of a locomotive applied to it, it would not follow that it was a locomotive belonging to the appellant, or one for the movements of which appellant was responsible.

The yard of appellant was, at least inferentially, not its private yard in the sense that it was used only for the cars and locomotives of the appellant, for at that very time the special car and locomotive handling it, both belonging to other corporations, were rightfully being moved about in the yard, and *non constat*, if the cars were forcibly and suddenly shoved ahead by a locomotive, it was by one that was in no sense the property or under the control of appellant.

We have heretofore held, in conformity with well-understood law, that in order to entitle a plaintiff to recover for the negligence of a defendant it is essential there should be evidence tending to prove, at least with reasonable certainty, that the injury was actually inflicted by the defendant. *Crane Co. v. Stammers*, 83 Ill. App. 332.

We have no purpose of trenching upon the functions of the jury to determine when, and under what circumstances, negligence as a matter of fact has been committed, but to uphold a verdict finding a defendant guilty of negligence there must be at least some evidence tending to prove such fact, and there was none in this case.

We observe no other substantial error in the record, but for that pointed out the judgment will have to be reversed and the cause remanded.

Calumet Land Co. and Louis A. Bryan v. James A. Perry.

1. PRACTICE—*Amendments in Matters of Form.*—Where a plaintiff amends his declaration in matters of form only, the defendant is not, for that reason, and as a matter of course, entitled to a continuance.

Calumet Land Co. v. Perry.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1898. Affirmed. Opinion filed January 2, 1900.

JOHN J. McCLELLAN and CHARLES C. SPENCER, attorneys for appellants.

JESSE A. & HENRY R. BALDWIN, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is a suit by appellee upon a promissory note made by appellants, payable to the order of the American Exchange National Bank. The indorsements material to this controversy are written "Am. Ex. Nat. Bank" and "Am. Nat. Bank." The declaration contained a special count and also the common counts.

The special count declared that the defendants made the said promissory note, etc., and thereby promised to pay four hundred dollars to the order of the American Exchange National Bank of Chicago, and that said bank indorsed the said note to the American National Bank, a corporation, etc., by which it was indorsed to the plaintiff. It appeared upon the hearing from the evidence that the name of the bank which transferred the note in question to the plaintiff was in fact "America National Bank." Appellee's counsel thereupon asked leave to correct the alleged clerical error upon the face of the declaration, by striking out the superfluous letter "n," which motion was granted, the pleas on file to stand to the amended declaration.

Counsel for appellants then objected to proceeding with the trial of the cause and moved to strike it from the short cause calendar, upon the call of which the cause was being tried. This motion being denied, appellants' counsel asked leave to file to the declaration as amended an amended plea, which they had that morning before been refused leave to file to the original declaration.

It is now urged that such leave should have been granted because appellants were entitled to plead *de novo* to the

declaration after it had been amended by striking out the letter *n*, so as to make the name of the bank read "America" instead of "American." No reason appears why the motion to file the rejected plea should have been granted. If a technical reason for justifying the court's refusal to allow it to be filed was wanted, it would be found in the fact that the said amended plea contained the same error in the name of the bank as the original declaration. The only reason stated in support of the motion, so far as appears from the abstract was, that after the amendment of the declaration the cause was not at issue. No offer was made and no leave requested to plead generally to the amended declaration. The amendment to the declaration, so far as appears, was not at all material, in that it did not affect appellants' defense to the note sued upon, nor render any new defense necessary. No showing at all was made in support of the motion to file the amended plea. Appellants offered no evidence, and if they have a meritorious defense to the action they utterly failed to make it manifest.

Where the plaintiff amends in matters of form only, the defendant is not, for that reason, and as a matter of course, entitled to a continuance. So far as can be determined from the record before us, the desire to plead *de novo* was not manifested at the trial.

The judgment of the Superior Court is affirmed.

Mary E. McChesney, Administratrix, etc., v. Alvin F. Davis, Executor, etc.

1. **PARTY WALLS—When Appurtenant to the Premises.**—Where a party wall is built under a contract, as in this case, the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so passing by every conveyance of it until the severance of the one-half by the payment of the purchase money. The sale of the half of the wall does not occur nor the title to it pass until the payment is made, and so, necessarily, it is constructively a sale by the assignee of so much of the wall. His right to the purchase money is not because he is the assignee

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of a covenant running with the land, but because he is the vendor of so much of the wall.

2. *SAME—When Builder is the Owner and Liable for Damages.*—The builder of a wall under a contract here is the owner of such wall until the other party to the contract makes payment therefor, and the builder is liable for damages for failure to maintain it in a safe condition.

3. *NOTICE—To an Agent, Notice to His Principal.*—Notice of a fact affecting the title, to an agent conducting negotiations for the purchase of real estate, is notice to his principal, if the knowledge of the facts is acquired while the agent is acting for his principal.

4. *SAME—Signs of Servitude.*—The fact that a party wall stands upon a lot at the time of its purchase constitutes an apparent sign of servitude, and is sufficient of itself to put a purchaser upon inquiry as to what is the nature of such servitude.

5. *PRACTICE—When the Term of the Presiding Judge Expires.*—It is incumbent upon a party moving for a new trial, the term of the trial judge having expired, to produce to his successor a transcript of the testimony, if necessary for the consideration of the court on the motion for a new trial.

Assumpsit, for the value of a party wall. Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 4, 1900.

Statement by the Court.—Catherine A. Hall and Anna E. Preston, being the owners of lots numbered 8 and 9 in Higgins' subdivision, adjoining each other, on West Madison street, Chicago, on May 10, 1883, entered into a sealed contract which, after designating said Hall as party of the first part and Preston as party of the second part, and reciting the ownership of the property, proceeded as follows:

"And whereas the said party of the first part has already built a party wall, one-half of which stands on the said lot of the said party of the first part, and the other half on the said lot of the said party of the second part, the center of said party wall being on the division line of the said lots hereinbefore mentioned, and whereas it is the intention of the parties to this agreement that said wall shall remain and be used as a party wall upon said lots as aforesaid,

"Now, therefore, this indenture witnesseth, that it is mutually covenanted and agreed by and between the said parties, in consideration of the premises, that the said party of the second part, her heirs and assigns, shall and may at

all times hereafter have the full and free liberty and privilege of joining to and using the said wall above mentioned as well as below and above the surface of the ground as along the whole length or any part of the length thereof, any building which she or they or any of them may desire or have occasion to erect on the said lot of the said party of the second part, and to sink the joists of such building or buildings into the said wall to the depth of one-half thereof and no further; provided, always, nevertheless, and on this express condition, that the said party of the second part, her heirs and assigns as aforesaid, before proceeding to join any building to the said wall and before making any use thereof or breaking into the same, shall pay or secure to be paid unto the said party of the first part, her heirs and assigns aforesaid, the full moiety or one-half part of the value of the said party wall, or as much thereof as shall be joined to or used as aforesaid, which value shall be the cost price at the time when such wall is to be used by the said party of the second part, her heirs and assigns, as aforesaid."

The contract contains a further provision for extension of the wall by either party, if desired, with liberty to the other of joining to and using such extension upon paying for the same as above provided, and also for the repair or the rebuilding of the wall, the expense of which should be borne equally between them, their respective heirs and assigns; also the further provision, "That this agreement shall be perpetual and at all times be construed as a covenant running with the land."

Said Hall and her husband, by deed dated May 1, 1883, acknowledged May 12, 1883, conveyed said lot 8 to William A. Baldwin, and said Preston thereafter on September 1, 1883, conveyed said lot 9 to Alexander C. McChesney, and said Baldwin and McChesney were the owners of said lots, respectively, on March 19, 1889, when this suit was commenced by Baldwin in assumpsit against said McChesney and Preston. Subsequently both said Baldwin and McChesney died, and the suit proceeded in the name of Davis, executor of the last will of said Baldwin, the appellee herein, against Mary E. McChesney, administratrix of the estate of said McChesney, appellant herein, the papers and all the proceedings in the cause being amended accord-

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ingly, and the suit having previously been discontinued as to said Preston.

A trial before the court and a jury resulted in a verdict for appellee, and assessing his damages at \$454, on which the court rendered judgment, to be paid in due course of administration, from which this appeal is taken.

The evidence shows that the negotiations leading up to the purchase by Alexander McChesney of lot 9 were conducted by James McChesney, and that during such negotiations the latter was told of the party wall agreement, and that he could ascertain its terms from Mr. Hall, the husband of said Catherine A. Hall, and it was testified that said James McChesney, in response to such statement, replied, "that he knew what the nature of the party wall agreement was." This testimony is not controverted.

Said Alexander McChesney, in the year 1886, constructed buildings on said lot 9, and in so doing used said wall for a support of the floor, ceiling and roof joists of such buildings.

The value of one-half of said wall, when it was so used by McChesney, was \$307.19, which, together with interest at five per cent per annum from March 1, 1889, amounts to \$454.39. February 28, 1889, demand was made by Baldwin, through his attorney, for one-half the cost of said wall, which the latter declined to pay. This suit was brought to enforce such payment.

At the close of all the evidence appellant asked the court to direct a verdict in her favor, which the court refused. The court then gave to the jury the following instruction:

"The court instructs the jury that notice of the existence of a party wall agreement, given to an agent of a purchaser, operates as a notice to such purchaser, and if the jury believe from the evidence that James McChesney conducted the negotiations for the purchase and conveyance of lot 9, in Higgins' subdivision, etc., one of the lots testified about, for and in behalf of his brother, Alexander McChesney, and with his consent; and if the jury further believe from the evidence that said James McChesney, at the time of the purchase of said lot, had notice, actual or constructive, of the existence of a party wall agreement, then such notice operated as a notice to Alexander McChesney of the existence of such agreement and of the contents thereof

by reasonable inquiry he could have learned of its contents."

When appellant's motion for a new trial came on to be heard, the term of Judge Ewing, who tried the cause, had expired, and the motion was heard by Judge Chytraus. The appellee's attorney requested appellant to furnish the court a transcript of the testimony taken in the cause, which was refused, and thereupon, at the request of the court, he presented a transcript of the testimony taken in the cause, and appellant's counsel objected to the use by the court of such transcript on the hearing of the motion, because it was not proven to be correct. Appellee's counsel then produced the stenographers who took the testimony, and offered to prove by them the correctness of the transcript presented. The court said, "I don't think that is necessary," whereupon appellant's counsel, after questioning one of the stenographers as to the correctness of a certain part of the testimony, and appellee's counsel consenting that the transcript might be corrected as to the matter thus inquired about, no further objection thereto was urged. No exception was taken to the action of the court in using the transcript of testimony so presented.

Appellant's counsel also objected to the hearing of said motion, because two pleas which had been filed were not then on file. It appears that these pleas were pleas of the general issue, and counsel for appellant was instructed to prepare substitute pleas in making up the record.

F. W. BECKER, attorney for appellant.

HARBERT, CURRAN & HARBERT, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Counsel for appellant argue, first, that the agreement in question was only a personal covenant, and did not run with the land; second, that there was no evidence of the cost price of the wall at the time of its use; third, that Catherine A. Hall had no right to contract with Mrs. Preston; fourth, that the instruction given by the court was

erroneous; fifth, that the discontinuance as to Mrs. Preston was error; and, sixth, that there was irregular practice on the motion for new trial.

As to the first contention of appellant, we are of opinion that it is unnecessary to hold that the covenant in the party wall agreement was such that it ran with the land in order to sustain this judgment. It is true that at the time the wall was built there was no agreement on the part of Mrs. Preston to contribute toward the expense of it, but it does not follow therefrom that the title to such part of it as was on Mrs. Preston's lot vested in her without her consent. The agreement made by her subsequently shows how she regarded the building of the wall partly on her lot. This agreement states, "It is the intention of the parties to this agreement that said wall shall remain and be used as a party wall on said lots;" also that the "party of the second part, her heirs and assigns, shall, and may at all times hereafter, have the full and free liberty and privilege of joining to and using the said wall, etc.," * * * but upon the express condition that before making any use of the wall the second party, her heirs and assigns, should pay one-half part of the value of the wall to Mrs. Hall, her heirs and assigns. These provisions of the agreement show as clearly as words could, that it was not the intention of Mrs. Preston to claim title to any part of the wall without first reimbursing Mrs. Hall, or her assigns, for its cost. We can perceive no difference because the contract was made after the wall had been built by Mrs. Hall. There was a sufficient consideration to support it in the agreement of Mrs. Hall to allow the use of her part of the wall, and even if there was not, appellant can not question it under the evidence in this case, the contract being under seal and importing a consideration.

In *Gibson v. Holden*, 115 Ill. 199, which it is claimed by appellant controls the case at bar, and in her favor, in speaking of cases like the one here under consideration, and distinguishing them from the one decided, the court say:

"In all such cases the title to the whole wall may be regarded as appurtenant to the lot of the builder, and so

passing by every conveyance of it until the severance of the one-half by the payment of the purchase money. The sale of the half of the wall does not occur, nor the title to it pass in those cases, until the payment is made, and so, necessarily, it is constructively a sale by the assignee of so much of the wall. His right to the purchase money is not because he is the assignee of a covenant running with the land, but because he is the vendor of so much of the wall."

So here the contract is a recognition by Mrs. Preston that she is not the owner of the wall, and is an undertaking on her part and her assigns to become the owner upon payment therefor, whenever she or they should desire to use the wall. The same principle is announced in the carefully considered case of *Tomblin v. Fish*, 18 Ill. App. 439, which was decided with express reference to and distinguished from the *Gibson case*, *supra*. The learned Judge Bailey, in his opinion, quotes the language above from that case.

The *Tomblin case* is expressly approved by the Supreme Court in *Mickel v. York*, 175 Ill. 62-70, which holds that the builder of a wall, under a contract similar to the one here in question, except that it was made before the wall was built, was the owner of such wall until the other party to the contract should make payment therefor, and that the former was liable for damages for failure to maintain it in a safe condition. See also *Richardson v. Tobey*, 121 Mass. 459; *Keteltas v. Penfold*, 4 E. D. Smith, 133; *Roche v. Ullman*, 104 Ill. 11-19.

The second contention is not supported by the evidence. It is clear, from a consideration of the whole evidence, that the value of the wall was estimated as of the year when it was used by appellant's intestate, to wit, 1886. The evidence was with reference to the whole year, and there is no evidence that the value of the wall varied at different times during that year. If such were the fact, it was incumbent upon appellant to show it.

The third contention, that Mrs. Hall had no right to contract, is not sustained by the evidence. Her deed to Baldwin is dated May 1, 1883, but was acknowledged May 12, 1883, and it was shown that the deed was not delivered until after the making of the contract with Mrs. Preston.

The fourth contention of appellant, that the instruction given by the court was erroneous, is not tenable. It is argued in this connection that notice of a fact affecting the title to an agent conducting negotiations for the purchase of real estate is not notice to his principal. The authorities cited by counsel are not applicable to this case nor to the instruction in question. The general rule is that notice to the agent is notice to the principal, if the knowledge of the facts is acquired while the agent is acting for his principal. *Williams v. Tatnall*, 29 Ill. 553.

The evidence shows that the notice to the agent in this case was during the time he was acting for his principal.

Moreover the wall in question stood partly upon lot 9, at the time of its purchase by Alexander McChesney, and constituted an apparent sign of servitude, and was sufficient of itself to put a purchaser upon inquiry as to what was the nature of the servitude. *Ingalls v. Plamonden*, 75 Ill. 118; *Washburn on Easements*, *54 and *459.

Fifth. The discontinuance of the suit as to Mrs. Preston and the amendment of the pleadings accordingly were justified by the statute. *Hurd's Rev. Stat.*, Chap. 110, Sec. 24; *Black v. Womer*, 100 Ill. 328.

As to the sixth claim, we think there was no error. It was incumbent upon the appellant, Judge Ewing's term having expired, to produce to the court, Judge Chytraus, a transcript of the testimony, if necessary, for the consideration of the court on a motion for a new trial. Without the testimony, so far as appears from this record, the court should have overruled the motion. In any event appellant can not complain of the action of the court in considering the transcript presented to it, because no exception was taken. That the court heard the motion in the absence of the pleas of general issue could in no way prejudice appellant. It was conceded that such pleas were filed, and appellant's counsel was directed to substitute the same in making up the record.

The judgment is affirmed.

**Bank of Montreal, Garnishee, v. Percy Taylor, for the
use of Julius T. Foerster.**

1. **GARNISHMENT—*Burden of Proof.***—In cases of garnishment the burden of proof is upon the garnishor to show that a judgment has been rendered against the user in favor of the usee, and an execution issued thereon and returned unsatisfied.

2. **JUDICIAL NOTICE—*Of What Courts Will Take.***—A court will take judicial notice of its records in the particular case on trial, but not of a judgment in another case or of an execution and its return, until produced.

3. **SAME—*Of Its Own Records.***—Courts will take judicial notice of their own records, as far as they pertain to a case in hand, but will not take notice in deciding one case of what may be contained in the record of another and distinct case, unless it be brought to the attention of the court by being made a part of the record of the case under consideration.

Garnishment.—Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed January 4, 1900.

REMY & MANN, attorneys for appellant.

No appearance by appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

In garnishment against appellant appellee recovered judgment on a trial before the Circuit Court, without a jury, for \$121.50, from which this appeal is taken. The affidavit shows that the usee, Foerster, recovered a judgment in the Circuit Court against the appellee, Taylor, at the May term, 1895, for \$213.50 and costs, on which an execution issued and was returned by the sheriff of said county, "No property found." Service was had on appellant June 17, 1893, and interrogatories were subsequently filed which appellant answered in substance, setting out details, however, that it was not indebted to Taylor at the time of the service of the writ of garnishment on which issue was taken.

Bank of Montreal v. Taylor.

The evidence shows that appellant, on May 13, 1895, received a cablegram from its London office to notify and pay Taylor twenty-five pounds, approximately \$121.50, which amount it did not place to Taylor's credit, but held it in the safe for him, because appellant had been previously served with a garnishment before Justice Foster at the suit of Taylor. The money was paid by appellant on a judgment rendered June 21, 1895, against it in the garnishment before Justice Foster, as appears from appellant's answer. The evidence only shows that the money was paid "on the garnishment before Justice Foster," but when paid, or whether a judgment was rendered before Justice Foster, does not appear. It also appears from the evidence of Taylor that he had no money of his own in the bank of appellant, and that the money placed there belonged to his daughter. Only two witnesses testified, the accountant of the bank on behalf of appellee, and Taylor, the nominal plaintiff, for appellant, and we are of opinion that the clear preponderance of the evidence is that the money, while placed to the credit of Taylor in the bank, was the money of his daughter. If, however, it be conceded that the money in the bank was Taylor's, still there was a fatal failure of proof on the part of appellee, in that there was no evidence that a judgment had been rendered in the Circuit Court against Taylor and in favor of Foerster, the usee, nor that an execution was issued or returned. *M. C. R. R. Co. v. Keohane*, 31 Ill. 144; *Davis, for use, etc., v. Siegel*, 80 Ill. App. 278, and cases there cited.

The learned trial judge seems to have proceeded upon the theory that he should take judicial notice of the judgment against Taylor and of the issuance and return of execution, but we are of opinion this was error. A court will take judicial notice, in the particular case on trial, of its records, but not of a particular judgment in another case or of an execution and its return until produced. *Robinson v. Brown*, 82 Ill. 279; *Nat'l Bank v. Bryant*, 13 Bush. (Ky.) 419; *Enix v. Miller*, 54 Iowa, 551; *Farrar v. Bates*, 55 Tex. 193; *McCormick v. Herndon*, 67 Wis. 648-52; 1 Jones on Evid., Sec. 124.

consolidated and tried as one suit. The abstract of record filed by appellant is very incomplete, but we understand that the pleadings, as finally settled, are a declaration in covenant, a plea of *non est factum* and a plea of release. No testimony was offered under the plea of *non est factum*. The only contested issue is upon the plea of release. The issue thus presented was tried by a jury and a verdict was rendered in favor of appellee.

Counsel for appellant contend that the verdict is not sustained by the evidence. The verdict is not so palpably against the weight of the evidence as to justify a reversal, for that reason, of the judgment entered thereon. No objection is made respecting the admission or exclusion of testimony. If there was no error in the submission of the issue involved, to the jury, the contention of counsel that the verdict is not sustained by the evidence can not prevail.

Complaint is made as to an instruction given at the request of appellee because it contained these words: "in this case, if you believe from the evidence that the defendant, Goldstein, assigned his lease or sublet the premises." The complaint is, there was no testimony tending to show that appellant leased or sub-let the premises. It appears that appellant sold his stock in trade which was upon the premises, and that the purchasers went into possession of the premises. One of the purchasers testified that appellant said to appellee that he (appellant) had sold out his business, "lease and all." There was testimony tending to show that appellant had either assigned his lease or sub-let the premises to his successors. No other objection to said instruction is made. That objection is not well taken.

Complaint is also made by counsel for appellant, that the court erred in refusing to give two instructions asked by appellant. They are upon the theory that the evidence tends to show that appellant offered in good faith to surrender said premises to appellee, and that appellee accepted such offer and that appellant did surrender said premises to appellee. There is no evidence whatever tending to sustain that theory. And, besides, there is no such issue in the

case. The court did not err in refusing to give said two instructions, or either of them.

It is also urged that said judgment must be reversed because the transcript filed in this cause shows that but ten persons were impaneled as a jury, and that the verdict is rendered by twelve. There appears in the transcript a copy of a paper purporting to be a verdict by twelve jurors. It is not in the bill of exceptions, and is no part of the record, and can not be considered by this court. *Prussing v. Jackson*, 85 Ill. App. 324; *Goldstein v. Smith*, 85 Ill. App. 588; *Lambert v. Borden*, 10 Ill. App. 648.

The case of *Nathan v. City of Chicago*, 75 Ill. App. 326, in so far as it may be construed as in conflict with the views here expressed and the cases cited, we are not disposed to follow.

A supplemental record, filed by leave of court, shows that the trial court entered an order after this cause was pending in this court, which shows that the jury was properly impaneled and returned a verdict in due form.

In this case a rehearing was ordered, and this opinion is upon such rehearing, and the opinion heretofore filed in this cause is withdrawn.

The judgment of the Circuit Court is affirmed.

The Sanitary District of Chicago v. Bridget McGuirl.

1. *EVIDENCE—Of Cash Value—What is Sufficient.*—The profits of the business of the past, and conjectural profits of the future, are too speculative and uncertain upon which to ascertain the market or cash value of property.

2. *EMINENT DOMAIN—Rule of Compensation.*—The proper compensation for property taken is the fair market value.

3. *DAMAGES—To Property by Public Improvement.*—Damages to property by a public improvement must be estimated under the same rules that they would be in a condemnation suit.

4. *SAME—Right of Jury to View the Premises.*—At common law the court is not bound to permit the jury to view the premises. The furthest the Supreme Court has gone in such a case, is to hold that it is within

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the sound discretion of the court to determine whether the jury shall be permitted to view the premises, and that it is not error to permit such view.

5. *SAME—When View Should be Refused.*—Such view, when permitted, should be before any evidence is heard. When the request is not made until after all the evidence is in, it is properly refused.

6. *SAME—Damages of Temporary Character.*—A claim for loss of rent, by reason of obstruction to access to and egress from a building during the progress of a public work, can not be sustained, it being merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made.

Action for Damages to property by a public improvement. Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed January 4, 1900.

M. V. GANNON and S. S. FALLAS, attorneys for appellant; CHARLES C. GILBERT and SEYMOUR JONES, of counsel.

Damages should only cover actual injuries in the way of depreciation of market value, and matters speculative, though mentioned in the testimony, should be rejected. *Jones v. Chicago & Iowa R. R. Co.*, 68 Ill. 380; *Kiernan v. Chicago, Santa Fe & Cal. Ry. Co.*, 123 Ill. 188; *Metropolitan, etc., R. Co. v. Stickney*, 150 Ill. 362.

Profits of past business on the land in question, or conjectural future profits, are not proper matters of consideration. *Jacksonville, etc., Ry. Co. v. Walsh*, 106 Ill. 253; *De Buol v. Freeport, etc., Ry. Co.*, 111 Ill. 499; *Chicago & E. R. Co. v. Blake*, 116 Ill. 163.

Inconvenience or damage common to entire public not ground for damages to individuals. *Chicago & W. Ind. R. Co. v. Ayres*, 106 Ill. 511; *City of E. St. Louis v. Flynn*, 119 Ill. 200; *City of Springfield v. Griffith*, 21 Ill. App. 93.

Loss of rent, by reason of obstructions to access to and egress from a building during the progress of the work on a public improvement, is not a damage to property not taken, but merely a burden incidentally imposed on private property. *Osgood v. Chicago*, 154 Ill. 194.

The mere diversion of travel, in consequence of the construction of a viaduct, however detrimental to the business

of plaintiff, is a thing for which he can not recover. *Hohmann v. Chicago*, 140 Ill. 226, and 41 Ill. App. 41.

WILLIAM E. HUGHES and JOHN J. COBURN, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

This is an appeal from a judgment in favor of appellee and against appellant for damages to appellee's real property, alleged to have been occasioned by appellant in constructing the drainage channel.

The jury returned a verdict for \$17,000, a motion for a new trial was overruled, and the court rendered judgment on the verdict.

Appellant is the owner of four lots, two of which, numbered 11 and 12, front east on Western avenue in the city of Chicago, and two of which, numbered 21 and 22, front on what purports, in a plat put in evidence by appellee, to be a street called Ash street or Artesian avenue. Between the lots fronting on Western avenue and those fronting on Ash street, the plat mentioned shows an alley of the width of fifteen feet. The lots are twenty-five feet in width by 125 feet in depth, giving a frontage on Western avenue of fifty feet and on Ash street the same, plaintiff's entire property running fifty feet in width from Western avenue to Ash street, including the alley. The lots fronting on Western avenue are mentioned by the witnesses as the front lots, and the others as the rear lots, and will be so referred to in this opinion.

The northwest corner of the north rear lot, numbered 22, is a little more than seventy-five feet south of the drainage channel, and the northeast corner of the north front lot, numbered 11, is a little more than 175 feet south of the drainage channel, as shown by appellee's plat. On the north front lot is a brick one-and-a-half-story cottage, with a frame basement, which was erected over seventeen years ago. On the rear lots there is a rendering and soap factory and barn. Appellee's attorney, on the trial, offered in evidence a plat to illustrate the location of the channel, the

grades, roadways, bridges and surroundings of appellee's property, and examined a witness in reference to it, but it does not appear that it was admitted in evidence, or any ruling in regard to it, and there is no plat in the record showing these things.

Appellee conducted a rendering and soft soap factory on her rear lots prior to the fall of 1895, when work was commenced on that part of the drainage channel in the vicinity of her property, and, at the time of the trial, was still engaged in that business. The drainage channel runs northeast and southwest, cutting through Thirty-first street and Ash street north of appellee's property. Thirty-first street is about 250 feet north of the property, as shown by appellee's plat. The damage complained of is the cutting off access to the rear lots, the causing water to flow into the basement of appellee's house, rendering such basement useless and uninhabitable, the settling and cracking of the walls of the house by reason of such flow of water, etc.

Appellee, in her examination in chief, testified that the value of her property, at the time they started to dig the channel, including the whole business, was about \$30,000, and that the decrease in value by reason of the work was about \$12,000. Being recalled, as a witness for herself, she testified that when she before said that the damage was \$12,000, she meant that the damage to the real estate, without reference to the business, was \$12,000, but that she considered the damage to her property, as a whole, about \$29,000. On cross-examination she testified that the profits were the main thing in her estimate; that the value of her property was \$30,000; that in such estimate she included about \$15,000 for profits. John Fitzpatrick, a witness for appellee, also considered, in his estimates of value and depreciation, the difference between profits made before the work commenced and the profits which he considered might be made in the business thereafter. The following occurred in the examination of the witness:

"Q. Do you, or do you not, mean to be understood as saying that the real estate there, for any purpose, was worth \$45,000? A. No, not in that way.

"Q. What do you mean? A. Why, that the difference in the profits of the business, or the difference in the percentage now and before that."

This testimony was given after appellee had testified, as heretofore stated, and had also testified that she had made in her business \$800 and \$900 per month. Hale, another witness for appellee, included in his estimate of value, \$18,000 on account of the business which had been established on the premises.

At the conclusion of appellee's evidence in chief, appellant's attorney moved the court to exclude from the jury all evidence showing the amount of profit derived from appellee's business, which motion the court overruled and appellant's attorney excepted. Appellant's attorney then moved to exclude all testimony as to the value of the business separate and apart from the property, or over and above the property, whereupon the court said: "If the motion is made as to that line of testimony that came out in response to your own questions, it is overruled. If there is any that was introduced over your objections by them, and you will call my attention to it, I will exclude it," to which ruling an exception was preserved. It appears, from a colloquy between the court and appellant's attorney during the trial, that the court ruled as it did, because it was the understanding of the court that the evidence as to profits was brought out in the first instance by appellant's attorney. This is true, in so far as the express evidence of appellee as to profits is concerned, but the evidence was brought out in the legitimate cross-examination of appellee, and the fact that it was so brought out, is not a sufficient reason for refusing to exclude it from the consideration of the jury. Appellee, on direct, testified, as before stated, that while the damage to her realty was \$12,000, the damage to her property, as a whole, was \$29,000. It was entirely competent to interrogate her, on cross-examination, as to the elements of her estimate, as to how she figured value and damage, and to inquire whether she included the profits of her business in her estimate, and if so, how much profits. The testimony of a witness is frequently excluded

altogether by reason of facts brought out on his cross-examination. That the evidence as to profits should not be considered by the jury in passing on the question of compensation to appellee was recognized as the law by the court, is evidenced by the following instruction, which the court gave to the jury:

"The court instructs the jury that there can be no recovery for loss of business or loss of profits."

The giving of this instruction did not, in our opinion, cure the error of refusing to exclude the evidence from the consideration of the jury before argument. The evidence not having been excluded, appellee's counsel used it in his closing argument to the jury, saying:

"It is undisputed that she made \$800 a month out of this business, clear profit. You can not escape from that evidence. If that is the evidence, and undisputed and proven, you can not escape from giving her a just compensation, full measure for the injury she has sustained. Eight hundred dollars a month is nine thousand six hundred dollars a year."

Appellant's attorney objected to these remarks, saying:

"I object to your verdict on \$9,000 profits in the business," to which appellee's attorney responded: "That is not what I am doing." The Court: "Do you dispute that there is such evidence in the record?" Appellant's attorney: "I dispute that there is any evidence in this record that there was \$9,000 a year profits made in that business." Appellee's attorney then proceeded with his argument as follows: "I say he is right. It is not \$9,000. It is \$9,600 a year—\$800 a month. Go and learn arithmetic. And I want to say another thing, that that is sixteen per cent on \$60,000," etc.

The evidence being before the jury, appellee's attorney had a right to comment on it, and the manner in which he did so, with the apparent approval of the court, indicated not alone by silence, but by the question addressed by the court to appellant's attorney, "Do you dispute that there is such evidence in the record?" was well calculated to influence the jury to award, by their verdict, a larger amount than they would otherwise have awarded, and, in our

opinion, in view of the evidence in the case, it did so influence the jury, notwithstanding the instruction of the court quoted, *supra*.

Much of the evidence for appellee is very unsatisfactory. After testifying on her own behalf as to value, she apparently disqualified herself as a witness by saying that she could not tell what was the fair cash value of the property, or what it would sell for in the market; that she could not tell whether she had an opinion or not. Edward McGuirl, appellee's son, after testifying on his direct examination that the fair cash market value of the property a month before the canal was put there was \$50,000, testified on his cross-examination that he did not know what the lots were worth in the market, and that when he was testifying as to the value of the property he meant by the fair cash value of it, that he would not sell it for any less. No objection being made by appellant's attorney, the evidence of these witnesses was allowed to remain in the case. None of the witnesses for appellant placed the value of the property, before appellant commenced work in its vicinity, higher than \$6,500, or the damage to it higher than \$2,700.

The contention of appellee's counsel that the evidence as to profits was competent, is erroneous.

Jacksonville & S. E. Ry. Co. v. Walsh, 106 Ill. 253, was a proceeding under the eminent domain law, to condemn Walsh's land. The appellee did a saloon business on the land. The court say:

"The profits of the business of the past and conjectural profits for the future were too speculative and uncertain upon which to ascertain the market or cash value of the property."

In Braun v. Met. W. Side El. R. R. Co., 166 Ill. 434, which was also a condemnation case, the court, after stating the proper rule of compensation, viz., the fair market value of the property proposed to be taken, say: "This rule excludes all evidence as to the amount of business done or which could be done in the property, or the probable profits arising therefrom," citing the case first cited *supra*.

Osgood v. City of Chicago, 154 Ill. 194, was a case, like

the present, to recover compensation for property not taken, but alleged to have been damaged by a public improvement, and the court say: "The damages, therefore, recoverable in this action, must be estimated under the same rules that they would have been upon a petition by the city to condemn the property."

These authorities dispose of the contention of appellee's counsel.

At the close of the evidence, appellant's attorney moved the court to permit the jury to view the premises, which motion was not objected to by appellee's attorney, but the court overruled the motion. This ruling is assigned as error. The object of the present suit is precisely the same as that of a cross-petition filed in a proceeding to condemn land under the provisions of the eminent domain act, and in the latter case it is expressly provided that the "jury shall, at the request of either party, go upon the land sought to be taken or damaged, in person, and examine the same, and after hearing the proof offered, make their report in writing," etc. 2 S. & C.'s Stat., C. 47, parag. 9.

The proceedings by cross-petition and by original suit being substantially the same, although different in form, and having the same object, it would seem that the rule should be the same. It is self-evident that in both cases there is the same reason for a view by the jury and, as a general rule, *ubi eadem ratio ibi idem jus*. Nevertheless, we can not say that in such case as the present it is error to refuse to permit the jury to view the premises on motion of one of the parties, because the eminent domain act applies in terms only to proceedings under and by virtue of that act, and at common law the court is not bound to permit such view. The farthest the Supreme Court has gone in such a case as the present is to hold that it is within the sound legal discretion of the court to determine whether the jury shall be permitted to view the premises, and that it is not error to permit such view. *Springer v. City of Chicago*, 135 Ill. 552; *Osgood v. City of Chicago*, 154 Id. 194.

In the present case, the request not having been made until after all the evidence was in, we think the court very

properly refused to permit a view by the jury. Such view, when permitted, should be before any evidence is heard, as contemplated by paragraph 9 of the eminent domain law, cited *supra*.

The uncontradicted evidence is, that the work in the vicinity of appellee's property is not completed, and that some of the things complained of in the present case are incidental to the performance of the work and of a merely temporary character. In *Osgood v. City of Chicago*, *supra*, the court say :

"The claim set up for loss of rent by reason of obstruction to access to and egress from the building during the progress of the work, can not be sustained. That is not damage to property not taken, within the meaning of the constitution, but merely a burden incidentally imposed upon private property adjacent to a public work, and without which such improvements can seldom be made," etc.

One of the complaints made by appellee, and relied on as an element of damage, is that access to her rear lots by the way of Ash street was cut off ; yet we can not find in the record any sufficient evidence that what is called Ash street is a public street, or that appellee has any interest in it appurtenant to her lots.

On account of the error in overruling the motion to exclude the evidence as to the value of appellee's business and the profits derived therefrom, the judgment will be reversed and the cause remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1899.

Chicago & Alton R. R. Co. v. Herman J. Myers.

1. PHOTOGRAPHS—*Generally Admissible in Personal Injury Cases.*—As a general rule, in personal injury suits, photographs are admissible as evidence.

2. INSTRUCTIONS—*Usurping the Province of the Jury.*—An instruction which takes from the jury the question whether, independently of any contract or rule, the plaintiff was bound to use ordinary care, is erroneous, as abrogating the common law obligation requiring the party to use proper caution.

3. WORDS AND PHRASES—*"Acquiesce" Defined.*—Ordinarily the term "acquiesce" implies knowledge, and means a quiet submission or compliance to a state of facts governed by the knowledge, so that to acquiesce means to know and acquiesce.

Action in Case, for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. JOHN H. MOFFETT, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 13, 1899.

WILLIAM BROWN, General Solicitor, and A. E. DEMANGE, attorneys for appellant.

WELTY & STERLING, LOUIS FITZ HENRY and HART & HOFFMAN, attorneys for appellee.

PER CURIAM.

In this action appellee sued appellant for damages on account of personal injuries received by him while act-

ing as a brakeman for appellant and while in the exercise of ordinary care for his own safety, as the result of negligence of appellant in maintaining an improper road-bed at the point where he was injured and in permitting the brakebeam of the car which hurt him to become loose. The declaration consists of eight counts. A trial by jury resulted in a verdict and judgment against appellant for \$15,000, and from such judgment this appeal is taken and various errors are urged to effect reversal of the judgment.

The evidence discloses that appellee was employed as a brakeman and on the night of November 25, 1897, which was rainy, dark and bad, in discharge of the duties of his employment, arrived at Joliet, Illinois, on one of the freight trains of appellant. In the yards there, some switching was to be done to leave certain cars of the train on a side track. Having prepared the switch for the purpose, appellee signaled the engineer to proceed to "kick back" in order to place one of the cars on the track desired. At the same time he approached the car to be thus separated and while the train was in motion to carry out the then object, appellee went in between the cars, stepping his right foot between the rails, and attempted to pull out the pin. This he could not do at first on account of some friction on the pin; whereupon he stepped with both feet between the rails and, walking along between the cars with the train, succeeded in pulling out the pin. Just at this moment he, in some manner, was thrown to the ground with his legs over the rail where they were caught and run over by a wheel, appellee thus losing both feet. The evidence is conflicting as to whether appellee stepped into a drainage ditch running across the track between two ties at or near the place of the accident and was tripped and fell, or whether he was tripped by the striking of a brakebeam upon his leg. The evidence also shows that at the time of his employment appellee signed and was sworn to an application for his position wherein it is stated that to walk between moving cars is against the rules of appellant company, and wherein he agreed not to take any risk in making couplings upon his

own motion or the order or request of any person. It also appears that appellee received a copy of appellant's rule which provided, among other things, that getting between cars in motion to uncouple them is dangerous and in violation of duty; and that every employe is required to use caution to avoid injury to himself, etc. Evidence was also taken, conflicting however, upon the question whether open and continued violation of the rule mentioned, by employes, had not created a waiver of it by appellant.

It is first contended by counsel for appellant that the court permitted evidence to be taken of the condition of the road-bed and track at points remote from the place of the injury. Ordinarily, where such a place is sharply defined, that objection might prevail. But upon an examination of the entire testimony the exact spot of the accident seems to be doubtful; and it is not clear which one of several, in a space of some length along the road-bed, is the right place. In that condition of the record it can not be said the court erred in permitting evidence to go in of the various places referred to. In that connection also it is urged as error that the court permitted two photographs of a part of the premises to be introduced in evidence. As a general rule in matters of this nature such photographs are admissible, and no reason is seen why an exception should be made in this case.

It is next urged that the court erred in permitting leading questions to be asked of appellee and other witnesses concerning the custom or habit of brakemen going between moving cars to uncouple them, the proof of which habit or custom is relied upon by appellee to constitute a waiver of appellant's rule on that score. Though vested to a large extent in the discretion of the trial court, still parties have a right to insist upon a proper examination of witnesses, especially those interested, on material points. Upon investigating the record concerning this objection of appellant, the court discovers that very large latitude in leading the witnesses upon this subject was given over the objections of appellant; and that in the cross-examination of Brinsley,

the engineer, and Moore, the conductor, appellee was permitted to elicit statements upon such a practice of brakemen. The direct examination of these two witnesses was of matters purely *res gestae*, and the court is very sure the statements asked for were not proper on cross-examination. Upon the whole the court deems these errors prejudicial to appellant.

The next assignment of error brings into consideration an instruction given by the court at the request of appellee. The force of the instruction is that it was the duty of appellant to have its tracks ballasted to the level of the top of the ties, if such ballasting was necessary to make the tracks reasonably safe in coupling or uncoupling cars; and if the tracks were not so ballasted as to be reasonably safe and appellee was thereby injured, he should recover. It is insisted that the instruction is the law in this case upon the authority of *L. E. & W. R. R. Co. v. Morrissey*, 177 Ill. 376. By referring to that case it will be early seen that it is not in point here and readily distinguished. There the issue was very clearly throughout the trial whether the railroad was in fact properly ballasted; and the instruction in discussion now was there properly given. Here one of the issues was, not whether the road-bed was properly ballasted, but whether a ditch existed, in the ballasting, by which appellee was injured. Thus it will be seen the object was not to determine generally whether the ballasting made the road-bed reasonably safe, but to determine the effect of the ditch, which was not submitted to the jury by the instruction. Having failed in that essential particular the instruction was of necessity misleading; and the defect is considered prejudicial.

Another instruction complained of is as follows:

"The court instructs the jury that even though you may believe from the evidence that the defendant company had published a rule forbidding brakemen upon its line of railroad going between moving cars to uncouple the same, and making it a violation of the duty on the part of the brakeman to go between moving cars to uncouple the same, yet if you further believe from the evidence that it was the

habitual practice of railroad brakemen on defendant's road to disregard said rule and to go between moving cars to uncouple the same under the conditions and circumstances shown by the evidence in this case with the experience plaintiff had, and that such habitual practice on the part of the brakemen had been continued for such length of time prior to the injury, that defendant company knew such was the habitual practice upon its line of road and defendant acquiesced in such habitual violation of this rule on the part of its brakemen, then under such facts, if you so find from the evidence, the rule so published would not in law be held operative and in force at the time of the injury."

It will be remembered that a part of this rule referred to the duty of employes to use caution to avoid injury to themselves. However accurate the statement in the instruction is as an abstract proposition of law, its use as here given in this case is certainly misleading and erroneous; for it effectually takes from the jury the question whether, independently of any contract or rule, appellee was bound to use ordinary care. Embodied in this contract or rule is the familiar law of the land that he should use ordinary care, for that is what that part of the rule means if it means anything.

Regardless of the rule or contract he is bound to do that. Yet without reference to this common law obligation of appellee the jury are told that the rule would not, in law, be held operative and in force on the grounds stated. Furthermore the effect of the instruction is to remove from the consideration of the jury the question whether going between moving cars to uncouple the same was negligence on the part of appellee sufficient to defeat his action. Independently of the requirement of the rule, the law required him to use proper caution; and under the law it was for the jury to say whether such act of going between the cars was contributory negligence. While it might be the appellant could waive the rule it promulgated as such, it would be unreasonable and against public policy to hold that the law itself was thereby abrogated. Had the instruction been so modified it doubtless would be sustained;

without it the court is compelled to say the instruction is erroneous.

Again it is urged the court erred in modifying the statement of the instruction that before the violations of appellant's rule should constitute a waiver of it by appellant, it must appear that appellant had knowledge of the opposing practice and acquiesced in it as such, by using the disjunctive "or" instead of the connective "and" between the ideas of knowledge and acquiescence.

Ordinarily the term "acquiesce" implies knowledge, and means a quiet submission or compliance to a state of facts governed by that knowledge; so that to acquiesce means to know and acquiesce.

The instruction as given informed the jury that if appellant had knowledge of the common practice of employes contrary to the rule, such rule should be taken as waived; or if appellant acquiesced in the practice, the rule would be likewise waived. The test is, all that is meant by acquiescence, either actual or implied—mere knowledge—would not constitute a waiver. So to use the idea of knowledge in that regard without extending it to the meaning of acquiescence, and so connecting it, would be inaccurate and misleading. For that reason the instruction is bad. One instruction given at the instance of appellee contains the correct statement of this rule; two offered by appellant on the subject have been modified as stated. The court is not inclined to hold the error in these two instances, in this case, corrected in that manner.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

E. D. Griswold v. S. H. Pierce.

1. REAL ESTATE AGENT—*When Entitled to Commissions.*—Where a real estate agent furnishes a purchaser, ready, willing and able to buy, he is entitled to his compensation, and the fact that he did not bring the

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parties to terms within the time limit fixed by the letter of his contract does not, in this case, defeat his right to recover.

Assumpsit, for commissions. Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

MATHEE & SNIGG, attorneys for appellant.

H. C. WARD and E. L. CHAPIN, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This was a suit brought by appellee to recover for services rendered appellant in the sale of a farm of 480 acres situated in Whiteside county, Illinois. There was a trial by the court without a jury, and a judgment rendered in favor of appellee for \$240. A reversal is sought solely upon the ground that the judgment is not supported by the evidence.

Appellee is a real estate broker, living at Tampico, Whiteside county, Illinois. Appellant, a resident of Springfield, Illinois, owned a farm in Whiteside county which he gave appellee the agency to sell. There is a dispute between them as to the terms of the agreement. Appellant claims that appellee was to have, as his compensation for negotiating a sale, all that would be realized over \$20,000, and that the option to sell was limited to a certain date. Appellee contends that he was to have fifty cents per acre if the land sold for less than \$20,000, and one dollar per acre if it sold for more than that amount.

On March 7, 1898, appellant wrote appellee to the effect that he could have one more week in which to make the sale, but no more. On the 10th of the month appellee took John F. Mundy, a real estate broker, and Joseph Hodnett, a proposed purchaser, to see the land, and put on foot negotiations which resulted in a purchase by Hodnett from appellant on the 23d of March, 1898. Appellee was not present when the deal was closed, and Mundy seems to have done much toward bringing the parties to terms. Appellee

must be regarded as furnishing a purchaser ready, willing, and able to buy. He was, therefore, entitled to compensation, and the fact that he did not bring the parties to terms within the time limit fixed by the letter of March 7th, does not defeat his right to recover. *Carter v. Webster*, 79 Ill. 435; *Wilson v. Mason*, 158 Ill. 304; *Hafner v. Herron*, 165 Ill. 246; *Schuster v. Martin*, 45 Ill. App. 482; *McClave v. Paine*, 49 N. Y. 561; *Sussdorf v. Schmidt*, 55 N. Y. 320.

Complaint is made that the court made a contract for the parties and rendered a judgment upon the theory that there was an implied promise to pay. We do not so understand from the record. The consideration named for the conveyance of the land was \$28,800. If the court adopted appellee's contention, and that was the amount actually paid by Hodnett, the judgment should have been \$480, one dollar per acre. The court manifestly reached the conclusion from the evidence that the land did not sell for that, but for an amount less than \$20,000, for the compensation was fixed at fifty cents per acre. Appellant shows no sufficient reason for reversing the judgment. Judgment affirmed.

Henry Fish v. People, etc., ex rel.

1. **PRACTICE—Orders of Court.**—Where the court in the course of a trial entered an order upon the docket "Continued until attorneys agree as to date for trial," and later on in the term, entered an order continuing the case until the next term, such order must be interpreted as applying only during the term at which it was made, and is superseded by a subsequent order at the same term definitely continuing the case to the next term.

2. **CONTINUANCE—Requisites of the Affidavit.**—An affidavit for a continuance by a defendant in a bastardy proceeding ought to deny the truth of the charge against him and disclose some defense in bar of the action.

Bastardy Proceedings.—Appeal from the County Court of Fulton County; the Hon. G. L. MILLER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 18, 1899.

KINSEY THOMAS and I. R. BROWN, attorneys for appellant.

B. M. CHIPERFIELD, State's Attorney of Fulton county, for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This proceeding was instituted on the 4th day of October, 1897, before a justice of the peace in Fulton county, on complaint of Annie Shawgo, an unmarried woman, charging appellant with being the father of her illegitimate child. The proceedings at the preliminary hearing resulted in appellant entering into recognizance to appear before the County Court on the first day of the next term, to there answer the charge and abide the order and judgment of the court. At the return term, there was a mistrial because of the failure of the jury to agree, and the case was continued to the May term, 1898. When the case was reached at the May term it was not tried, but, in pursuance of some arrangement among the attorneys, the judge entered on his docket, "continued until attorneys agree as to date for trial," and later on in the term, the court entered an order continuing the case to the next term. The next term was the November term, 1898, and on the 12th of November of that term, the State's attorney notified one of appellant's attorneys that the case would be called for trial on the 21st day of that month. Upon receiving such notice, no other date was suggested by appellant's attorneys, nor was any objection made to the day named.

Appellant's counsel contend that by the order of the court, entered during the May term, the case was continued indefinitely, and that it could not, at any subsequent time, be set or called for trial until some date had been agreed upon, and that appellant's attorneys did not agree that the case might be set for, or called, on November 21st.

We do not so interpret the order. We understand that order as applying only during the term at which it was made. The subsequent order of that term definitely continuing the case to the next term, entirely superseded that order, and the case stood for trial subject to call, in its order on the

docket, at the next term. It was the duty of appellant, under the conditions of his bond, to take notice and be present on the first day of the term to which his case was continued, and it was his duty, under the law, to exert himself in the meantime, to be ready for trial. Assuming that appellant's attorneys understood it as they now contend, they were in no manner deceived or unfairly dealt with, for they were given ample notice of the date the case had been set for, and made no objection to the day fixed.

The case was tried by jury, on the day for which it was set, resulting in a verdict and judgment against appellant.

A number of errors are assigned on the record, but the only one relied on as ground for reversal is, that the court denied appellant's motion for continuance.

After a motion for change of venue had been overruled and the case finally called for trial, appellant moved the court for a continuance of the case to the next term, because of the absence of certain witnesses, and supported his motion by his own affidavit and that of both his attorneys, as to diligence in procuring attendance of the witnesses and as to the materiality of the testimony they would give, if present.

On the 17th day of November appellant's attorneys filed a præcipe with the clerk for subpoena for seven witnesses; the sheriff, on the day set for trial, made return of service as to four of them, and not found as to the three others. When this subpoena was actually delivered to the sheriff does not appear, nor does it appear that the sheriff knew, or that he was in any manner directed to where the witnesses might be found. Appellant had all the time that had elapsed since the adjournment of the previous term to get ready for this trial, and his attorneys had nine days actual notice of the date set for the trial. The witnesses all lived in the country, and it must be presumed were all then at their usual places of abode, within a few miles of the court. Upon the facts, as disclosed by this record, it can not be held that due diligence was exercised by appellant and his attorneys to procure the attendance of the absent witnesses, nor can it be held that due diligence in that

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behalf, on their part, would not have resulted in procuring the attendance of such witnesses.

We do not deem it our duty to further discuss the sufficiency of the showing in support of the motion for continuance, yet, in our judgment, it is subject to just criticism in a number of respects. For instance, appellant does not, in his affidavit, deny the truth of the charge against him, nor disclose any defense in bar of the action. True, the affidavit states the existence of some testimony which, if produced, would tend to impeach the prosecuting witness, and also tend to support a denial of the charge, but neither in the affidavit nor on the trial did appellant deny the charge. He was present during the trial, accompanied by his attorneys, with four of his witnesses in attendance, and saw fit to neither testify in his own behalf, nor offer any of his witnesses.

As we understand appellant's brief, his counsel do not contend that the court erred in refusing to grant the change of venue prayed, and they admit that their affidavit in support of their motion for new trial, which was made and presented to the judge after the motion had been argued and decided, and the court had adjourned for the term, is not proper part of the record.

Having examined with such care as we can, the material objections urged by appellant against the record in this case, and finding no error sufficient to warrant a reversal, we therefore affirm. The order and judgment of the County Court is affirmed.

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189	28

Frank E. Dooling, Receiver, etc., v. James Coats and Sarah Coats.

1. **FORMER DECISIONS**—*Followed*.—The decision in *Frank E. Dooling, receiver, etc., v. John W. Davis et al.*, 84 Ill. App. 393, governs this case.

Foreclosure.—Appeal from the Circuit Court of Pike County; the **HON. HARRY HIGBEE**, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 18, 1899.

GRAHAM & MILLER, attorneys for appellant.

WILLIAMS & COLEY, attorneys for appellees.

OPINION PER CURIAM.

The above entitled cause having, upon the motion of appellees, been consolidated with No. 40, "Frank E. Dooling, receiver, etc. v. John W. Davis et al.," decided at the present term of this court, and the mooted question being identical with the mooted questions involved in that case, for the reasons expressed in the opinion filed in that case the decree of the Circuit Court will be reversed and the cause remanded, with directions to state the account and enter decree accordingly. Reversed and remanded with directions.

T. B. Lewis v. Walter Carr.

1. *CONTRACTS—Performance of, as a Requisite to a Recovery.*—Where the terms of the contract require a person to pass a medical examination upon an application for life insurance, money advanced upon such application as the first year's premium on the policy can not be recovered back where such person refused to take the examination.

2. *SAME—Promise as a Consideration.*—One promise is not always a good consideration for another promise.

Assumpsit, for money paid. Appeal from the Circuit Court of Shelby County; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 13, 1899.

WALTER C. HEADEN, attorney for appellant.

CHAFEE & CHEW, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

On the 25th of May, 1897, appellee applied for a life insurance policy on himself for \$2,000 in the New York

Life Insurance Company, through appellant, then acting as agent for the company. The premium for each year was to be \$47, the first payment to be made on the application being signed. Appellee, instead of paying cash for the first year's premium, gave his note for \$47, payable to appellant on the first of January, 1898. Appellant, as agent for the company, gave appellee a receipt, stating that the note was given for the insurance, and that when the company had received the report on the medical examination, if a policy should not be issued, the note should be returned. It was arranged that appellee should go to Dr. J. W. Knox, the local medical examiner for the company, residing some two miles from appellee's house. Three days afterward appellee called upon Knox, but the examination was not made, because Knox told him that he had not received the necessary papers. On the following day, and two days later also, appellee called upon Knox, but the examination was not made because appellee was dissatisfied and was not willing to take it. About ten days thereafter Knox called at appellee's house for the purpose of making the examination, but appellee refused to permit it.

Appellant sold the note before maturity to one T. F. Dove, and to him appellee paid the amount called for by it. To recover the amount so paid, \$47, this suit was brought before a justice of the peace. On appeal from the judgment rendered by the justice a trial was had in the Circuit Court, resulting in a verdict and judgment in favor of appellee for \$47 and costs.

Although the \$47 was paid for insurance not obtained by appellee, appellant contends that appellee has no right to recover it back, because of his refusal to take the medical examination. Appellee contends that he is not precluded from a recovery on account of such refusal, for the reason that on the 14th of February, 1898, appellant took his application for insurance in the Bankers Life Insurance Company, of Kansas, under an agreement that if he should pass the medical examination required by that company, the \$47 already paid should be applied on the first premium,

and that if he should fail to pass that, appellant would pay him back the \$47. Over the alleged contract of February 14th there is a sharp conflict in the testimony, appellant contending that while he took appellee's application for insurance in the Bankers Life Insurance Company, he did not agree that in the event of appellee's failure to pass the medical examination required by that company he would pay to appellee the amount which had been paid on the other application. His testimony is that he insisted on appellee's taking the examination under the application to the New York company, but finally consented that if appellee did not want to do that and should pass the examination required by the Kansas City company, he would make him a present of the first premium on the policy of that company. In the conflict appellant is corroborated by two other witnesses who were present, while the testimony of appellee is unsupported by corroboration.

Although there is some difference between the testimony of Dr. Knox and appellee as to what occurred between them relating to the examination, it is clear to our minds that no examination was made, because of appellee's disinclination and refusal to take it. With the alleged contract for insurance with the Kansas City company out of the case there would be no right to recover. Money paid as first year's premium upon application for life insurance policy, where the terms of the contract required the applicant to pass a medical examination, is not recoverable back if the applicant refuses to take the examination.

It devolved upon appellee to establish his contention as to the agreement of February 14, 1898, by a preponderance of the evidence. This he failed to do. We are disinclined to reverse a judgment for the reason that the verdict of the jury is against the evidence where the evidence is conflicting, because the opportunities of the jury for judging of the witnesses are so superior to ours. But we shall not hesitate to do so where the verdict is palpably against the weight of the evidence and has been aided by an erroneous instruction. For the plaintiff the court gave to the jury the following instruction :

"3. The court instructs the jury that one promise is a good consideration for another promise, and if the jury believe from the evidence that Lewis had promised to have a life policy issued to Carr in the New York Life Insurance Company for two thousand dollars, and afterward, before any policy had been issued by the New York Life Insurance Company, Lewis, as agent for the Bankers Life, of Kansas City, agreed with Carr that he would give him a policy in the Bankers Life for the same amount in lieu of the New York Life Insurance Company, if he, Carr, successfully passed the medical examination, and if he did not he, Lewis, would pay back to him, Carr, the forty-seven dollars Carr had first advanced, and that thereupon Carr submitted himself to an examination of the Bankers Life Association physician, and the Bankers Life rejected him, Carr, on such examination, then Lewis was liable to pay over to Carr the money so advanced by him, and the jury should so find."

One promise is not always a good consideration for another promise.

Although appellant, as agent of the New York Life Insurance Company, had promised appellee a policy, the promise was upon condition that appellee should take and pass the required medical examination. Appellee refused to take the examination. No duty rested upon appellant to procure a policy or return the money. There was not, therefore, mutuality of engagement. Had appellee taken the examination and passed, the obligation would have rested upon appellant to procure the policy. Had he taken the examination and failed, the obligation would have rested upon appellant to pay back the \$47. In either case there would have been mutuality of engagement in the alleged agreement.

The instruction entirely ignored the condition mentioned.

For the reason that the verdict is palpably against the weight of the evidence, and that it was aided by the erroneous instruction above quoted, the judgment will be reversed and the cause remanded.

Sidney Clark et al. v. Daniel W. Brenneman, Eli Brenneman and W. P. Shade, Partners Under the Name of D. W. Brenneman & Co.

1. **MORTGAGES—Practice in Foreclosing.**—It is not error for the court to permit an amount paid, to redeem from a sale under the foreclosure of a prior mortgage, to be added to the amount due on a subsequent mortgage in process of foreclosure.

2. **SAME—Rule of Construction.**—The elementary rule in construction of mortgages is to ascertain from the instrument the intention of the parties, giving meaning to all the words and clauses used, if possible, and then give effect to such intention.

Foreclosure Proceedings.—Error to the Circuit Court of Christian County; the Hon. WILLIAM M. FARMER, Judge, presiding. Heard in this court at the May term, 1899. Reversed in part and affirmed in part. Opinion filed December 13, 1899.

J. C. & W. B. McBRIDE, attorneys for plaintiffs in error.

JAMES B. RICKS, attorney for defendants in error.

OPINION PER CURIAM.

This was a bill in equity to foreclose a mortgage against plaintiffs in error, the lands being described as the south seven-eighths of the west half of the west half of the southeast quarter of section one, town twelve, range three, the north twenty-one seventieths being subject to the dower of Susan M. Clark; said mortgage is not to include the fee in said dower interest situated in the county of Christian. A decree of foreclosure was entered in the Circuit Court by default, and included the fee in the dower interest as well as the other land described, to reverse which this writ of error is prosecuted.

It is first insisted that the court erred in permitting an amount paid to redeem from a sale under the foreclosure of a prior mortgage to be added to the amount due on the mortgage then foreclosed. We are of the opinion, however, that under the authority of *Morse et al. v. Smith*, 83 Ill. 396,

this was proper. It is next urged that it was erroneous to include in the decree the land embraced in the above mentioned dower interest for the reason, as it is argued, that the language of the mortgage excludes that portion of the lands free from its lien. Against this contention it is argued that the clause in the mortgage wherein it is declared that the mortgage is not to include the fee in the dower interest is repugnant to that which precedes it, and should therefore be rejected. The mortgage is doubtless bunglingly drawn, yet the elementary rule of construction should be applied to it, which is to ascertain from the instrument the intention of the parties, giving meaning to all the words and clauses, if possible, and then give effect to such intention. Applying this rule we feel compelled to hold that it was the intention of the parties to the mortgage to wholly exclude the north twenty-one seventieths of the tract described, from the operation of the mortgage, and it therefore follows that the decree is erroneous to the extent that it includes such part of the land, and in this respect the decree will be reversed, and otherwise affirmed, and that the decree may be executed to the extent it has been affirmed, the cause is remanded.

Henry C. Meyer v. F. W. Meyer, Adm'r, etc.

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e100	*262
86	417
s101	98

1. **EXPERT TESTIMONY—When Not Competent.**—If, when furnished with all the facts and circumstances surrounding the matter in controversy, an ordinary man could determine all the elements upon the question in controversy, without interposing the judgment of another whose expertness on questions of science, skill or trade rendered such judgment necessary, then such expert testimony will not be competent.

2. **SAME—When Not a Proper Subject For.**—When the testimony of a witness is a part of the knowledge of ordinary men, it is not a subject calling for expert testimony.

3. **INSTRUCTIONS—Assuming Matter Not Proven.**—An instruction which assumes the existence of a material issue on the trial, and under the evidence a fact which, in view of the law, can not be assumed, but must be left for the jury to determine, is erroneous.

4. MASTER AND SERVANT—*Duty of the Master.*—The master is bound to furnish appliances reasonably safe for a person in the exercise of ordinary care for his own safety.

Action in Case, for personal injuries. Appeal from the Circuit Court of Cass County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 13, 1899.

MILLS & MCCLURE, attorneys for appellant.

LYMAN LACEY, SR., R. R. HEWITT, CHARLES A. SCHAEFFER and FINIS E. DOWNING, attorneys for appellee.

OPINION PER CURIAM.

Appellant was sued by appellee for damages on account of negligence resulting in the death of Edward E. Meyer, appellee's intestate, while deceased was, in the exercise of due care for his own safety, performing certain labor in the employment of appellant. The declaration consists of two counts—the second of which is in substitution of another not considered in the case—which charge in substance that appellant owned and operated an ice plant for harvesting, handling and storing natural ice, in operating which a revolving shaft with a set screw in a collar, and a clutch for the gearing, was used with a platform; that the machinery was ordinarily managed, without mounting the platform, by ropes and pulleys which, when out of repair, necessitated a man to stand on the platform to use a lever; that appellant negligently maintained such machinery without encasement on an improper platform, and deceased, as appellant's servant, went upon the platform to operate the machinery, where his clothing was caught by the set-screw and he was killed; and also that such platform was not safe for the purpose; that it was no part of deceased's employment to work the lever, but to shovel ice; that appellant was represented there by a foreman who negligently ordered deceased to quit his proper duty and to go upon the platform and operate the lever, whereby he was killed. A trial by jury resulted in a verdict and judgment against appellant for \$2,000, to reverse which this appeal is taken.

The evidence shows that on the night of February 2, 1899, the weather being cold, appellant was hurriedly storing ice in anticipation of a thaw. The ice was hauled up an inclined plane by steam power applied through an endless chain by means of a revolving shaft, the collar of which was held in place by a set screw, which projected one inch from the collar, and revolved with it at a speed of eighty-two revolutions per minute, the whole of this machinery being high in the air at the side of an ice-house. The gearing was manipulated usually by ropes and pulleys from below; but in case of such appliances being disabled, the gearing was also controlled by a lever, to operate which one was compelled to get upon a platform with his feet at or near the level of the revolving shaft, and to stand there with the collar and set screw a few feet away. On the night in question something went wrong with the ropes and pulley control of the gearing; and deceased went, at the request or order of appellant's foreman, from his work shoveling slush ice, to mount the platform and operate this lever. He was furnished a lantern and accompanied to the position by the foreman, who threw the lever once or twice, and who, after seeing deceased do the same, left him there at about ten o'clock with the admonition not to attempt to get out until the machinery stopped. The machinery was stopped later to adjust the chain which had slipped, when deceased did descend and assist in replacing it, several other men helping upon top of the platform. After the chain was replaced deceased resumed his position on the platform and operated the lever frequently as he had prior to the incident of the chain slipping. At about one o'clock some queer noise was heard, the machinery was stopped, and on investigation deceased was found suspended from the shaft, his life extinct, his clothing wrapped on the shaft with the inside hem at the bottom of the right trouser leg fastened on the set screw. The shaft, collar and set screw were not boxed in any manner. The collar and set screw were at the east end of the shaft, several feet from the place deceased was directed to stand. During the trial four witnesses,

called at the instance of appellee, were permitted to testify over appellant's objection, to the effect that the shaft, collar and set screw were, in their opinions, dangerous and unsafe for the operator of the lever, because they were not boxed or covered. The evidence further tends to show that the deceased was a careful man.

One of the errors urged to reverse this judgment is that the court should have sustained the objection to the testimony of the four witnesses who, in the nature of experts, declared the machinery dangerous and unsafe. In this age it is within the common observation of every one that a swiftly whirling collar on a shaft with the stub of a set screw projecting from it, is a menace to all who get within radius of its tangling power. No jury could possibly need evidence on that subject; and yet it was a question of fact in this case for the jury to determine from all the evidence whether the machinery and all its appliances was reasonably safe, when in its operation at that place one used ordinary care for his own safety. If, when furnished with all the facts and circumstances surrounding the matter in controversy an ordinary man could determine all the elements of that question without interposing the judgment of another whose expertness on some question of science, skill or trade rendered such judgment necessary, then such expert testimony would not be competent; and in so far as the expert testimony would be competent it would be a part of the ultimate judgment or determination arrived at. The matter of the testimony of these four witnesses being a part of the knowledge of ordinary men, it was not a subject calling for the expert testimony, and to ask and admit the opinions of the witnesses therein was improper; it was for the jury to say, not the witnesses. *Brink's, etc., Co. v. Kinnare*, 168 Ill. 643. The admission of this testimony was prejudicial error.

It is then urged that the court erred in giving certain instructions. The first instruction complained of is in effect that if the foreman in the scope of his authority ordered the deceased to leave certain work, then engaged in, and to proceed to operate the machinery, and if deceased obeyed

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and did operate the machinery, and while in the exercise of ordinary care was killed by it, and further, if the order was negligently given and the machinery was dangerous to his safety, under the circumstances, as operated, by reason of being uncovered or not cased, and that it was negligently erected in that condition, and for a long time so operated, then the defendant would be guilty of such negligence as would entitle the plaintiff to recover, provided deceased was not guilty of contributory negligence; and that knowledge of some danger in case a servant obeys his master's order is not an assumption of the increased risk by the servant unless the danger was such that an ordinarily prudent man would not have encountered it, notwithstanding the master's order. This instruction goes to the whole case and is bad for several reasons. It assumes that deceased was employed in the first instance for the express purpose of shoveling slush ice. While that was the particular work he happened to be engaged in at the time of the change in his duties, we do not gather, from the evidence, that was the sole purpose of his employment. The instruction further assumes that deceased was properly carrying out his duties in the line of his employment at the time of the accident. This of course is appellee's contention throughout the case; but it was one of the material issues on the trial, and, under the evidence, a fact which, in view of the law, could not be assumed, but must be left for the jury to determine. The instruction further directs the jury upon the event of their finding the machinery dangerous to the safety of Meyer "under the circumstances when and where he was so operating the same," by reason of the lack of covering or boxing. This does not limit the matter of the safety of the machinery to a person in the exercise of ordinary care. The master is bound to furnish appliances reasonably safe to a person in the exercise of ordinary care for his own safety. The law in that regard should have been so stated in effect; it was error to do otherwise. Finally the instruction assumes that there was some increased risk in connection with the duties devolved upon deceased in operating this machinery. This

was altogether a matter for the jury to decide without invasion; and the instruction is bad for that reason also.

Another instruction complained of is as follows:

"You are further instructed that where the danger attending the work is not incident to the servant's employment nor assumed by him under the contract of service, then if ordered to do extra hazardous work and the servant is injured while in the exercise of ordinary care, then he may recover, and the jury are instructed that the burden of showing the knowledge of such danger on the part of the servant is on the defendant."

This instruction assumes that whatever dangers attended the work of deceased were not incident to his employment and were not assumed by him and that he was ordered to do certain work and that such work was extra hazardous. These matters so assumed were all the proper subject of determination for the jury alone; and to thus obviate the necessity of their findings on the questions proposed was harmful error. Another instruction is as follows: "The jury are further instructed that, not only the defects but the danger must be known to the servant before he can be held to take his own risk." Here the jury were informed that regardless of whether the master knew or ought to have known of defects and danger, and regardless of whether any obligation rested upon the servant to discover the same, he could not be held to have taken his own risk with them unless he in fact knew of such defects and danger. Of course this is not the law and the instruction is palpably erroneous.

Certain other instructions complained of are defective for the reasons already stated and which the court deems it unnecessary to repeat. The assumption of controverted facts is the vice particularly apparent; and the court is compelled to say the errors are prejudicial and the judgment must be reversed.

For the errors indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

Henry C. Suttle v. H. B. Finnegan.

1. PROPOSITIONS OF LAW—*When the Court Should Not Refuse.*—The court should not refuse a proposition of law when it correctly states the law applicable to the evidence.

Assumpsit, on a promissory note. Appeal from the Circuit Court of DeWitt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded with directions. Opinion filed December 13, 1899.

F. K. LEMON, E. J. SWEENEY and MOORE, WARNER & LEMON, attorneys for appellant.

A. L. PHILLIPS and JOHN FULLER, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court. The record in this case shows that on November 12, 1897, in vacation, the appellant filed with the clerk of the Circuit Court of DeWitt County, a declaration in assumpsit, in which he charged that appellee made and delivered to Scroggin & Company his promissory note, dated August 9, 1895, in which he promised to pay them, one year after date, \$543.75, with interest at the rate of seven per cent per annum from date until paid, to which was also added a power of attorney authorizing any attorney to confess judgment in any court at any time thereafter for the amount that appeared to be due and unpaid on the note, together with \$25 attorney's fees and costs; that after the note was delivered and before the declaration was filed, said Scroggin & Co. indorsed the same in writing and then delivered the note to the appellant, whereby the appellee became liable and promised to pay the appellant the sum of money specified in the note, according to its effect, but had failed to do so, to the damage of the plaintiff, etc.

On the same day the declaration was filed an attorney, acting under said power of attorney, filed with said clerk a cognovit, in which he entered the appearance of the appel-

lee, admitted all the facts alleged in the declaration, and confessed that the appellant was entitled to a judgment against the appellee, under the claim made in his declaration, for \$648.81 and costs. To this cognovit was attached the note and power of attorney mentioned in the declaration, and an affidavit of the appellant to the effect that he knew the appellee had executed the power of attorney, and was still living.

The record fails to show that the clerk entered up a formal judgment in vacation, in accordance with the declaration and cognovit, but it does show that during the December term, 1897, of that court, on motion of the appellee, the court made an order opening up the judgment rendered in vacation in this case, and gave the defendant leave to plead to the declaration; and that in pursuance thereof, the defendant afterward filed a number of pleas thereto, the first being the general issue; the others all setting up in bar of the action: (1) that the consideration of the note sued on was for money won by the appellant from the appellee by gambling; (2) that the consideration was for money lent and advanced by the appellant to the appellee for the purpose of gambling in wheat on the board of trade; (3) that the consideration was for losses due from the appellee to the appellant upon gambling contracts made by the appellee through the appellant, and further setting up that while the note was given to Scroggin & Co., it was to them as the trustee for the appellant; and (4) that the consideration of the note was an option contract between the appellee and appellant; and each of the special pleas claims that the note was void under the statute of Illinois.

Issue was joined upon the first plea and the others traversed and issue joined. A trial was then had by the court by consent of the parties, the court found for the defendant, and gave judgment in bar of the action, and for costs.

The appellant brings the case to this court by appeal and urges a reversal of that judgment, upon the grounds that the finding and judgment are against the evidence, and that the court improperly refused propositions of law submitted by the appellant.

The evidence shows that the appellant and appellee lived in Kinney, Illinois, and both being desirous of purchasing on the board of trade, in Chicago, an option upon 10,000 bushels of wheat, directed Snyder, Fiffe & Co., of Chicago, who were members of that board, to purchase for them, in the name of the appellant, an option on 10,000 bushels of wheat, which they did. Wheat advanced in price and that deal was closed out at a profit to the appellee of \$130, without his paying any part of the margin upon which the purchase was made.

The appellee received \$30 of that profit and left \$100 remaining in the hands of the appellant, directing him to purchase, in his name, another option on wheat for them both; and thereafter the appellant, in pursuance of that request, purchased, in Chicago, in his name and through the same firm, an option on 15,000 bushels of wheat, 10,000 bushels on his and 5,000 bushels on defendant's account. Wheat rapidly declined in price thereafter, and that deal was closed with the knowledge and consent of the appellee, at considerable loss, and the appellee's share thereof upon settlement, was ascertained to be \$643.75, upon which appellant paid the \$100 left in his hands and appellee agreed to pay the balance thereof, if defendant would give him the note described in the declaration, which defendant did, and the same was thereafter assigned by the payees therein to the appellant.

After the evidence was closed the appellant, among other propositions of law, submitted to be held as the law in this case, the following:

"If it appears from the evidence in this cause that the plaintiff and defendant jointly purchased on the board of trade in Chicago, a quantity of wheat, and that the plaintiff, acting for and on behalf of himself and the defendant, and with the knowledge and consent and approval of the defendant, closed out or disposed of said grain at a loss to the plaintiff and defendant, and the proportion of said loss sustained by each was ascertained and determined by the plaintiff and defendant, and that the plaintiff settled the loss for the defendant and plaintiff jointly, and that the consideration

for the note in evidence was the adjustment of such loss between the plaintiff and defendant, the court holds that as a matter of law, such consideration is a legal consideration, and is not within the inhibition of the statute in relation to gaming contracts or in violation thereof; and this although the purchase of grain by the plaintiff for himself and the defendant jointly was not a *bona fide* purchase of grain and that it was not intended that any grain should be delivered or received or sold by the plaintiff and defendant."

The court refused it, an exception was taken, and that ruling is urged as error.

We think the court ought not to have refused this proposition of law, because it correctly stated the law applicable to the evidence; for the consideration of the note was shown to be \$543.75 paid by appellant as part of appellee's share of the loss sustained by both upon an illegal option deal in wheat made jointly by them with another, and which part the appellant paid to that other party after the loss was sustained, and at the request of the appellee. Such a transaction, we think, comes within the principle which this court announced in the case of *Brooks v. Bradley*, 53 Ill. App. 155, where presiding justice Boggs, speaking for the court, said:

"The consideration * * * was not within the inhibition of the statute. It was not money won by the payee of the maker by betting with him upon the result of an election, but an amount paid by the payee to another for the maker after the loss had been sustained. We do not understand that such a consideration is within the statute. Sec. 131, Chap. 38, R. S."

The defense set up by the pleas and which the appellee undertook to establish, was that the consideration of the note sued on, was money paid or advanced for the appellant upon a loss sustained by appellee upon a gaming contract made by the appellee with the appellant.

But appellee failed to establish that defense, as the evidence showed that the consideration of the note was a part of appellee's share of the loss sustained upon a gambling contract made between appellant and appellee jointly with another, which was not the defense pleaded, nor would it be a good defense if pleaded.

Federal Life Ass'n v. Smith.

The Circuit Court therefore committed reversible error when it refused said proposition of law, and also when it found the issues for the defendant; for which errors we reverse its judgment and remand this case to that court with directions to enter a judgment therein for the plaintiff, for the amount called for by the note, and for costs. Reversed and remanded with directions.

Federal Life Association v. James N. Smith.

1. **PRACTICE—*Amendment of Declaration After Verdict.***—The court has the power to allow an amendment after the return of the verdict and the argument for a new trial.

2. **INSTRUCTIONS—*Preponderance of Evidence and Burden of Proof.***—An instruction in an insurance case which tells the jury that while the burden is on the plaintiff to prove the case alleged in the declaration by a preponderance of the evidence, yet when that has been done the burden of proof shifts to the defendant to show that the warranties contained in the policies, or some one of them, are not true, is proper, in this case.

3. **INSURANCE—*What Constitute Warranties.***—Only such statements as are strictly in answer to inquiries contained in the application can be regarded as warranties.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

Statement.—On the 9th of November, 1896, the Federal Life Association of Davenport, Iowa, issued to Catherine Smith, of Urbana, Illinois, three policies of insurance upon her life for \$1,000 each, for the benefit of her husband, James N. Smith. On the 4th of October, 1898, she died, and soon thereafter her husband furnished to the association the required proofs of death. After receiving the proofs of death and comparing them with the written application made by Mrs. Smith at the time she applied for insurance, the association refused to pay the policies, upon the ground

that she made false and fraudulent representations relative to her health, and physicians attending her. Thereupon Smith commenced suit upon the policies in the Circuit Court of Champaign County, where a trial was had, resulting in a verdict against the association for \$3,000.

At the conclusion of the evidence for the plaintiff the defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled. The motion was renewed after defendant concluded its evidence, and was met by the same ruling from the court.

After the verdict was returned, a motion for new trial was made and argued; whereupon the plaintiff, under leave of court and against the objection of the defendant, amended his declaration so as to except from the averment contained herein that the answers of himself and physician contained in the proofs of death were all true, his answer to question 10 and the physician's answers to questions 4 and 5. The answers were to the effect that the physician and his father had attended the deceased in sickness a few years prior to the issuing of the policies. The amendment averred that the answers were untrue and that they were mistaken when they gave them. After the amendment was filed, the court overruled the motion for a new trial and rendered judgment against appellant for \$3,000.

GERE & PHILBRICK, attorneys for appellant; GEO. E. HUBBELL, of counsel.

JOHN J. REA, attorney for appellee.

Only such answers by the applicant for insurance as are strictly responsive to the question are warranties. *Com. Accident Co. v. Bates*, 176 Ill. 194; *Howard F. & M. Ins. Co. v. McCormick et al.*, 24 Ill. 455.

The burden is upon the defendant to show that the assured obtained the policies by fraud and deceit. *Brooks v. Bruyn*, 35 Ill. 392; *Hodgen v. Henrichsen*, 85 Ill. 259; *Lake Shore & M. S. R. R. Co. v. The Pittsburgh, Ft. W. &*

Federal Life Ass'n v. Smith.

C. R. R. Co., 71 Ill. 38; Wright v. Grover et al., 27 Ill. 426; Blow et al. v. Gage et al., 44 Ill. 208; Cameron v. Savage, 37 Ill. 172; Hatch v. Jordan, 74 Ill. 414; Jewett & Root v. Cook, 81 Ill. 260.

In this State it is not necessary for the plaintiff in an action on a policy to either allege or prove such matters as appear in the application only. To be availed of as a defense, without regard whether they are warranties or representations merely, their falsity or breach by the assured must be set up and proved by the defendant as a matter of defense. Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Herron v. Peoria M. & F. Ins. Co., 28 Ill. 235; Guardian M. L. Ins. Co. v. Hogan, 80 Ill. 35; Piedmont, etc., Ins. Co. v. Ewing, Adm'r, 92 U. S. 377; Phenix Ins. Co. v. Stocks, 149 Ill. 319; Mutual R. F. L. Ass'n v. Powell et al., 79 Ill. App. 482.

MR. JUSTICE HARKER delivered the opinion of the court.

In seeking a reversal of the judgment in this case, appellant complains of the admission of improper evidence on behalf of appellee; the refusal of the court to instruct the jury to return a verdict for the appellant; the action of the court in allowing appellee to amend his declaration after the motion for a new trial was argued; that the court improperly instructed the jury for appellee; and that the verdict was against the law and the evidence. But little is said in the printed argument of appellant about the alleged error of admitting improper evidence, and we can discover none from the record.

In the application for insurance Mrs. Smith represented that for ten years prior thereto her general health had been uniformly good; that she had no physician at that time and had "never called in one." Upon the ground that these representations were false, the suit was defended. When the motion to instruct the jury to return a verdict was overruled, proofs of death were in evidence showing that she had been sick within ten years prior to making the application, and had been attended by two physicians. There

was an averment in the declaration that the answers to questions in the proofs of death were true. If the court erred in overruling the motion in that condition of the pleadings and proofs, that error was subsequently corrected by the amendment to the declaration averring that the answers to the questions touching the previous health of the deceased and attendance of physicians, appearing in the proofs of death, were untrue and that the persons making them were mistaken. The court had the power to allow the amendment after the return of the verdict and the argument of a motion for a new trial. Sec. 1, Chap. 7, and Sec. 23, Chap. 110, Rev. Stat. Illinois.

We are unable to see anything wrong with the first instruction given for appellee, the only one complained of. It tells the jury that while the burden is on the plaintiff to prove the case alleged in the declaration by a preponderance of the evidence, yet when that has been done the burden of proof shifts to the defendant to show that the warranties contained in the policies, or some one of them, are not true. In view of the defense interposed and the state of the proofs, the instruction was entirely proper. *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319.

The chief contention of appellant is that the verdict is against the evidence; that the defense that the policies were rendered void by the false answers of Mrs. Smith to questions in the application for insurance should have prevailed. To the question, "Has your general health been uniformly good for the past ten years?" she answered, "Yes." To the question, "How long is it since you were attended by a physician?" she answered, "Have never called in one." To the question, "Give name and residence of that physician?" she answered, "Have none." To the question, "Have any material facts regarding your past health or present condition been omitted? state facts fully," she answered, "Nothing."

These are the answers which, it is claimed, were false. That the general health of Mrs. Smith, prior to making the

application, had been uniformly good, appears from the testimony of her son and husband. True, they were contradicted, in a measure, by other witnesses, but it was the peculiar province of the jury, in the conflict, to say where the truth was. During the entire period of the ten years in question, not once had she been confined to her bed or house by sickness, and had attended to her household duties without the assistance of a hired girl. She had occasionally complained of headache and indigestion, but they are complaints which sometimes visit people of excellent general health. Headache is frequently caused by overwork and worry; indigestion, by eating improper food or eating in an improper manner. No doubt there are many persons who have several times during the past ten years suffered from attacks of headache and indigestion, brought on by the indiscretions mentioned, who could truthfully say that their general health for that period had been uniformly good.

Mrs. Smith was not guilty of fraud sufficient to vitiate the policies by answering, "Have never called in one," to the question, "How long since you were attended by a physician?" In the first place, the answer is not strictly responsive. Only such statements as are strictly in answer to inquiries contained in the application can be regarded as warranties. *Commercial Accident Co. v. Bates*, 176 Ill. 194.

Appellant contends that if Mrs. Smith had consulted a physician or received treatment from one within ten years prior to the time of her application, it was her duty in answer to the question to disclose it. She was not asked whether she had consulted a physician or received treatment from one. Doubtless, she understood the question as inquiring how long since a physician had waited on her in sickness at her home, and we think such understanding accords with the popular meaning of the expression. If appellant understood the question as meaning office treatment, and consultation as well, it should not have been satisfied with the answer, "Have never called in one," but should

have insisted upon a strictly responsive one. What has been said relative to this answer applies to the answer, "Have none," to the question as to who her physician had been.

The ailments of Mrs. Smith up to the time of making her application had been so trivial that we can not think that she was guilty of any fraud in answering "Nothing" to the final question, "Have any material facts regarding your past health or present condition been omitted?" Twice had Dr. H. W. Miller prescribed for her, when she called at his office in company with a niece, then under treatment with Miller. Four or five times she had called at the office of Dr. J. T. Miller and obtained prescriptions. The prescriptions were made several years before the date of her application. On one or two occasions, several years before, she had consulted a Dr. Alpine concerning a deafness in one ear. Further than on those occasions, it does not appear that she had, within the period of ten years, consulted a physician or received treatment. At the time of her application, she had the appearance of a healthy woman, and that fact is testified to by appellant's examining physician.

A careful consideration of the entire evidence in the record satisfies us that the judgment is right and should be affirmed.

Presiding Justice WRIGHT, having presided at the trial of this case in the court below, took no part in the decision in this court.

Danville Democrat Pub. Co. v. John C. McClure.

1. *LIBEL—Charge of "Shameless Skulduggery" Actionable.*—A newspaper publication charging the president of an institution of learning with "shameless skulduggery" is libelous, and actionable as such.

2. *JUROR—Misconduct—What is Not.*—Pending the trial of a case in court, a juror, during the noon hour, in the presence of the attorneys for both sides, the presiding judge and the other officers of the court, had a short conversation with the plaintiff with reference to sending his son to the institution in his charge, and handed to him an envelope contain-

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ing his son's address, to which he requested that a catalogue be sent; but the court was unable to discover anything in the conduct of the juror to justify the conclusion that the verdict was influenced in any way by what was said or done.

Action in Case, for libel. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

LAWRENCE & LAWRENCE and TILTON & CUNDIFF, attorneys for appellant.

JONES & PARTLOW and J. W. KEESLAR, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an action on the case by appellee against appellant for publishing an alleged libelous article in the Danville Daily Democrat, a daily newspaper published by appellant at Danville, Ill.

Appellee is the president of Greer college, an institution of learning located at Hoopeston, Vermilion county, Illinois. In a contest between Hoopeston and Danville to secure the location of the teacher's institute for the year 1898, appellee was very active in the effort to secure its location at Hoopeston, believing that it would benefit his institution. A circular letter had been sent out setting forth the advantages of Hoopeston, and extending to the teachers an invitation to cast their vote on an inclosed postal in favor of Hoopeston. A few days after this circular letter had been mailed, appellee and others called at the office of the county superintendent, where a conference was held, and it was agreed that the superintendent should draft a circular letter to the teachers of the county in which he was to place appellee in a proper light and controvert certain attacks that had been made upon him in the columns of appellant's newspaper. It was agreed that until this letter should be sent out neither side should solicit for the location of the institute, and that before being printed

the superintendent should send to the Hoopeston parties for their approval, a draft of the letter, and that it should not be printed or sent out until after he had received their approval. The superintendent forgot to send the draft of his letter to Hoopeston for approval, and did not send them a copy until he had had it printed and commenced mailing it out to the teachers. A circular letter was then issued from Hoopeston, at the instance of appellee, setting forth to the teachers advantages of the location of the institute at that place. This occasioned, in the columns of appellant's newspaper, an attack upon the appellee, in which he was charged with misrepresentation, "sly chicanery, underhand methods," and "shameless skulduggery." Thereupon this suit was brought.

From the declaration we quote the following as the alleged libelous publication :

"On Monday the decision will be given which will locate the Teachers' Institute either in Danville or Hoopeston. The methods of the Hoopeston campaign have been a wonderful and fearful thing to behold, and no depth of subterfuge has been too low for the misrepresentation of the man in charge (meaning plaintiff) to sink to it.

"Be it understood, that in his (meaning the plaintiff) sly chicanery and underhand methods he (meaning plaintiff) is no representative of the people of Hoopeston. A short time after the agreement had been made to leave the matter to a fair vote, which each party pledged not to influence in any way, President McClure (meaning the plaintiff) sent out a circular letter, presenting the merits of Hoopeston, and incidentally stating that the circular was issued with the knowledge and consent of Superintendent Griffith. Superintendent Griffith brands this as a statement willfully false, and he (meaning Superintendent Griffith) knew nothing of the circular, nor of the continued shameless skulduggery of the Hoopeston man (meaning the plaintiff). This circular fell into friendly hands, and was forwarded to the superintendent, who publicly denied that it had his countenance.

"When the result is announced Monday there is no doubt that the verdict will be in favor of Danville, as this city has not only offered the most advantages and the best facilities, but has kept faith in the matter. Whatever may be

the outcome, the contest will have been valuable to the citizens of Vermilion county, in that it will have shown them a few things about the head (meaning the plaintiff) of the only college in the county."

The appellant filed the general issue and a plea of justification. Upon the issues thereby raised, a trial was had by a jury resulting in a verdict of \$500 for appellee. A motion for new trial was overruled and a judgment entered upon the verdict.

Appellant urges reversal upon the grounds, first, that the verdict is against the evidence upon the plea of justification, second, upon the ground of misconduct of a juror.

Considering the station in life occupied by appellee and his position at the head of an institution of learning, it can be readily seen how injurious the publication of the article above quoted would be to him. We do not care to extend this opinion by a lengthy discussion of the evidence adduced before the jury in an effort to justify the publication of the article. We shall be content to say that we are unable to discover from the evidence contained in the record any words spoken or written by appellee which in any degree reflect upon the character or actions of any person. It seems that he made nothing more than an earnest and vigorous effort in an honorable way to secure the location of the teachers' institute in the town which was the seat of the college over which he presided. His conduct in sending out letters after the conference at the superintendent's office was entirely justified in view of the fact that the superintendent, through forgetfulness, had failed to redeem his promise to send a draft of his proposed circular to him for approval before having it printed.

Pending the trial, a juror by the name of Gibson, during the noon hour, just before the convening of court, in the presence of the attorneys on both sides, the presiding judge and the officers of the court, had a short conversation with appellee with reference to sending his son to Greer College. The juror handed to appellee an envelope containing his son's address, to which appellee was requested to send a catalogue of the school. We are unable to discover any-

thing in the conduct of the juror or appellee to justify the conclusion that the verdict was influenced in any way by what was there said or done.

We regard the attack made upon appellee in appellant's newspaper as intemperate, malicious and wholly unjustified.

We look upon the damages fixed by the jury as very low and see no error in the record. Judgment affirmed.

86	436
892	464

86	436
96	294

86	436
104	273

86	436
110	547

86	436
111	1358
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Illinois Central Railroad Co. v. William F. Farrell, Adm.

1. CONTRIBUTORY NEGLIGENCE—*What is.*—A person who fails to observe due care and blindly walks into danger which the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who by the observance of due care could extricate himself from danger, but failing to make any effort for his personal safety, is injured.

2. INSTRUCTIONS—*Improper Measure of Damages.*—An instruction which tells the jury to allow plaintiff "such damages as you may deem fair and just compensation," without limiting them to the evidence or giving them any rule to estimate the damages, is improper, as leaving the jury to give such damages as they may have deemed the plaintiff ought to recover, according to their individual notions of right and wrong, regardless of the evidence.

Action on the Case.—Death from negligent act. Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 13, 1899.

CHARLES L. CAPEN, attorney for appellant; JOHN G. DRENNAN, of counsel.

EWING, WIGHT & EWING, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action on the case in which the appellee, as administrator of the estate of Mary E. Tones, deceased, seeks to recover from the appellant damages for negligently

causing the death of his decedent upon a public road crossing. A trial was had by jury, which resulted in a verdict and judgment in favor of the appellee for \$5,000, to reverse which the appellant brings the case to this court and urges, as grounds therefor, that the verdict is contrary to the evidence, the damages are excessive, and the court gave improper and refused proper instructions.

The declaration contained four counts in all of which it is averred that appellee's decedent was in the exercise of due and ordinary care for her own safety, and was killed as the result of the negligence of appellant.

In the third count, the negligence charged was that the appellant failed to give the statutory signals when the train in question was approaching the road crossing. The appellee pleaded not guilty.

The evidence shows that the deceased was a widow, twenty-five years old, when killed, and left two daughters, one five, the other three years old, the mother supporting herself and children by working as housekeeper for her brother. That about 8:30 o'clock P. M. of November 23, 1898, the deceased was killed at a public road crossing, where the tracks of appellant's railroad crosses it. She was in a buggy at the time, drawn by a horse which was being driven in a good trot by a male companion, who was going with her to a dance at a place beyond the crossing.

They made no stop, nor did they slacken their speed when they approached the crossing, to better enable them to ascertain if a train was about to pass, and when the buggy reached the railroad tracks the locomotive of a passenger train of appellant came along at the rate of about thirty-five miles an hour, struck their buggy and killed both of them instantly. There was a sharp conflict in the evidence as to whether or not the bell was rung or the whistle sounded, in the manner required by statute, as the train approached the crossing.

In this condition of the proof, the court gave the jury, at the request of appellee, the two following instructions:

1. "You are instructed that the law requires that every

railroad corporation shall cause a bell of at least thirty pounds weight, and a steam whistle, to be placed and kept on each of its locomotive engines, and that it shall cause the same to be rung or whistled at the distance of at least eighty rods from the place where the railroad crosses any public highway, and that the same shall be kept ringing or whistling until such highway is reached, and if you believe from the evidence that the train in question approached the crossing in question without ringing a bell or sounding a whistle, as required by said law, and that by reason thereof, and as a result of such failure to ring a bell or sound a whistle, plaintiff's intestate, while crossing the defendant's railroad and in the exercise of ordinary care for her own safety, was struck and killed by said train, then your verdict should be for the plaintiff for whatever pecuniary damages you may believe from the evidence the next of kin has sustained by reason thereof."

2. "If you find that the defendant is guilty, under the evidence and instructions of the court, then it is your duty to assess the plaintiff's damages, and in assessing the damages you have a right to take into consideration all of the facts and circumstances shown by the evidence, bearing upon the question, and to allow such damages as you may deem a fair and just compensation, with reference to the pecuniary injuries resulting from the death of the plaintiff's intestate, to her next of kin."

The first instruction was calculated to give the jurors to understand that the court required them to find a verdict for the plaintiff if they believed, from the evidence, that the defendant failed to do those things therein enumerated, and by reason thereof the plaintiff's intestate was killed while crossing the defendant's railroad, and that she was *then* in the exercise of ordinary care for her own safety. While under the evidence, to warrant a verdict for the plaintiff, the jury should have been required to believe that plaintiff's intestate was in the exercise of ordinary care before *attempting to cross* defendant's railroad, as well as *while* crossing it. For "one who, failing to observe due care, blindly walks into danger that the observance of due care would have enabled him to avoid, is no less guilty of contributory negligence than he who, by the observance of due care, could extricate himself from danger, but fails to make any effort

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for his personal safety, and because thereof, is injured." C., M. & St. L. Ry. Co. v. Halsey, Adm'r, etc., 133 Ill. 248, and Abend v. T. H. & I. R. R. Co., 111 Ill. 203.

Whether or not the deceased used ordinary care to avoid the collision is shown by the evidence to have been a vital question, and one sharply contested on the trial; therefore the instruction should have been clear and certain on that point and being uncertain and calculated to mislead the jury, it was prejudicial error to give it.

The second instruction told the jury to allow plaintiff "such damages as you may deem fair and just compensation" without limiting them to the evidence or giving them any rule to estimate the damages. This was improper, for it left the jury to give such damages as they deemed the plaintiff ought to recover according to their individual notions of right and wrong, regardless of the evidence. *Keightlinger v. Egan*, 65 Ill. 235; *Rolling Mill Co. v. Morrissey*, 111 Ill. 646; and *C., C. & St. L. Co. v. Jenkins*, 174 Ill. 398. The giving of this instruction as drawn was also prejudicial error.

Counsel for appellant urge that the verdict is contrary to the evidence, and the damages are excessive. We will not express an opinion upon these questions, because we have concluded to reverse the judgment upon appellee's erroneous instructions.

As to appellant's refused instructions, we will say that the court properly refused them all, for some invade the province of the jury on questions of fact, and others do not properly state the law applicable to the evidence, so appellant has no right to complain on that score.

On account of the two erroneous instructions above mentioned, we reverse the judgment of the Circuit Court and remand the case for a new trial. Reversed and remanded.

W. C. Thompson v. Anna Elliott.

1. **CHattel MORTGAGE FORECLOSURE**—*Under the Act of 1899.*—Section 1 of the act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanics' tools, approved June 5, 1899, does not apply to a chattel mortgage upon a piano.

2. **SAME**—*Order of Court, When Unnecessary.*—An order of a court of record for an order directing the sheriff to seize mortgage property is unnecessary, unless such property consists of necessary household goods, wearing apparel or mechanics' tools.

3. **HOUSEHOLD GOODS**—*What is Not.*—A piano used in a family is no part of the necessary furniture of the household.

Action on the Case, for the wrongful taking of property. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1899. Reversed. Opinion filed December 13, 1899.

PENWELL & LINDLEY, attorneys for appellant.

LAWRENCE & LAWRENCE, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Baldwin & Company, manufacturers and dealers in pianos, sold appellee, on the installment plan, a piano for \$375. The first payment consisted of an old organ and some cash, amounting in all to \$135, and the balance was divided into quarterly installments of \$25 each, for which appellee gave her promissory note and also the following contract:

PIANO AND ORGAN CONTRACT.

"I, Anna Elliott, residing at No. — street, Town of Ridge Farm, County of Vermilion, State of Illinois, in consideration of three hundred and seventy-five dollars, to me paid by D. H. Baldwin & Co., do hereby sell and convey to Dwight H. Baldwin, Lucien Wulsin, A. A. Van Buren, George W. Armstrong, Jr., and Clarence Wulsin, comprising the firm of D. H. Baldwin & Co. of Indianapolis, Indiana, their heirs and assigns, one Baldwin piano, No. 2,023, style No. 21, C. W., to be void if I shall pay to D. H. Bald-

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win & Co., at Farmers' State Bank of Ridge Farm, Ill., three hundred and seventy-five dollars, as follows:

Forty dollars on the 10th day of July, 1895; \$95 on the 10th day of July, 1895; \$25 on the 10th day of October, 1895; \$25 on the 10th day of January, 1896; \$25 on the 10th day of April, 1896; \$25 on the 10th day of July, 1896; \$25 on the 10th day of October, 1896; \$25 on the 10th day of January, 1897; \$25 on the 10th day of April, 1897; \$25 on the last day of July, 1897; \$25 on the 10th day of October, 1897; \$15 on the 10th day of January, 1898, until the full sum above named shall have been paid, with interest on each of said sums at the rate of seven per cent. per annum, which amounts are secured by my notes of even date herewith.

I am to retain possession of said property until default shall be made in payment of said sums (insuring loss by fire), but if I fail to make any of the payments with interest thereon at the times above specified, or shall attempt to sell or remove said property from the premises or town above mentioned without written consent of D. H. Baldwin & Co., or if at any time they or their assigns may declare the entire amount due and take possession of said property and sell the same at auction, or giving ten days' notice by advertisement in a newspaper, or by private bargain without advertisement, at such prices as they may deem proper, and after deducting the amount due them, interest thereon as above, expense, including costs of sale, pay to me the overplus, if any, on demand at their place of business.

Witness my hand and seal this 10th day of July, 1895.

ANNA ELLIOTT. [SEAL.]”

Appellee paid the first three installments, but failed to make further payment. After some six or seven installments had fallen due, appellee undertook to move the piano from where she had been living to Danville, Ill., when one Ben Hester, a deputy sheriff under appellant, took possession of the instrument and delivered it to Baldwin & Co. Baldwin & Co. advertised it for sale and bid it in for \$165, the balance due on the notes and contract. This suit followed against appellant, he being the sheriff of the county, and Hester, acting as his deputy, in taking possession of the piano. A trial was had, resulting in a verdict and judgment for \$200.

Section 1 of an act to regulate the foreclosure of chattel

mortgages on household goods, wearing apparel and mechanics' tools, approved June 5, 1899, reads as follows :

"Be it enacted by the people of the State of Illinois, represented in general assembly, that no chattel mortgage on necessary household goods, wearing apparel or mechanics' tools covered by a chattel mortgage shall be seized or taken out of the possession of the mortgagor and foreclosed, except by sheriff, and then only after the mortgagee, or his agent, shall present an affidavit to a judge of any court of record, setting forth that the mortgage is due, or that he is in danger of losing his security, giving the fact upon which he relies, and shall obtain an order from such judge directing such sheriff to seize such household goods, wearing apparel or mechanics' tools, and hold them subject to the order of the court; provided that nothing herein shall apply to the sale of furniture by regular dealers on the so-called installment plan; provided, this act shall not apply to the foreclosure of chattel mortgages executed prior to the time this act shall take effect."

Acting on the theory that the above statutory provision required them to apply to a judge of a court of record for an order directing the sheriff to seize the property in question, Baldwin & Co. filed in the County Court of Vermilion County a sworn application for such an order. It was obtained and placed in the hands of appellant to execute. No such order was necessary to entitle them to possession of the piano. It clearly appears that it was no part of the necessary household furniture; and further, it was purchased from regular dealers on the installment plan. Treating the contract as a chattel mortgage and commencing proceedings in court to foreclose it, under the fallacious idea that such course was necessary, did not estop Baldwin & Co. from exercising the right to seize the property after discovering their mistake, as contended by appellee. They had done nothing to cause appellee to change her course of conduct, or to act differently from what she would have done had no affidavit been filed in the County Court.

Under the evidence in the case, there is no cause of action against appellant. The judgment will be reversed, but the cause not remanded.

**Emaline Gilliland v. Henry Mohlenhoff, C. P. Nichols
and Ed. McIntyre.**

1. **BURDEN OF PROOF—*In Suits for Negligence.***—In an action to recover damages for negligence in the construction of a bridge, the burden of proof is upon the plaintiff to show that the defendants were guilty of negligence and that he has been injured thereby.

Action for Negligence, in the construction of a bridge upon a public highway. Appeal from the City Court of the city of Mattoon; the Hon. JAMES F. HUGHES, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

JAMES W. & EDWARD C. CRAIG, attorneys for appellant.

ANDREWS & VAUSE, attorneys for appellees.

OPINION PER CURIAM.

Appellant sued appellees in an action on the case, by which she charged them with negligence in the construction of a bridge upon a public highway, and causing excavations of the banks of the creek over which the bridge was built, and thereby caused the waters of the creek to flow upon appellant's lands, greatly to her damage and injury. A trial by jury resulting in a verdict and judgment against appellant's contention, she has appealed to this court, assigning various errors to effect a reversal of such judgment.

Appellees were commissioners of highways in the town where the bridge in question was located, and the building of it was in the line of their duty as public officers and a public necessity; but if in the construction of such bridge and the excavations incidental thereto they failed to exercise proper care, and by reason of this appellant was injured, she would be entitled to recover the damages thereby imposed upon her property. The burden of proof was upon her to show that appellees were guilty of negligence and that she was injured thereby.

Upon an examination of the evidence contained in the

record we feel compelled to find that appellees are not guilty of the negligence with which they are charged, nor did they fail in respect of proper care in regard to the rights of the appellant; neither do we believe the injuries she attributed to the acts of appellees resulted from such cause, but were the natural effects of the elements. We are of the opinion no other verdict than the one induced would have properly responded to the evidence, and while some of the instructions to which objections have been made could not be maintained as accurate statements of the law applicable to the case under a different state of the evidence, yet, in the view we have already expressed concerning the case, such instructions produced no harmful effect.

Finding no reversible error the judgment will be affirmed.

M. T. Shepherd v. E. A. Wacaser, A. Wacaser, Emma A. Wacaser and Mary O. Wacaser.

1. **USURY—Devices to Avoid.**—The law will tolerate no shift or device to enable a person to escape the operation of the usury statute.

Assumpsit.—Appeal from the Circuit Court of Piatt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 18, 1899.

JOHN R. & WALTER EDEN, attorneys for appellant; LODGE & HICKS of counsel.

REED & EDIE, attorneys for appellees.

MR. JUSTICE HARKER delivered the opinion of the court. Appellant obtained judgment by confession in vacation for \$592.37, upon a promissory note executed by appellees on August 3, 1896, to S. L. Shepherd, and assigned to appellant. The judgment was opened up on motion and a trial had in the Circuit Court upon plea of the general issue, and a stipulation that all matters of defense could be admitted

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under that plea. The suit was defended upon the ground that the note was tainted with usury, and that the unpaid portion of it was made up entirely of usurious interest charged against appellee on notes, of which the one sued on is a renewal. The defense prevailed and judgment was entered accordingly. An appeal is prosecuted on the ground that the verdict is against the evidence and because the court improperly instructed the jury.

The evidence shows that appellant conducts a private bank at Lovington, Illinois. At various times during the year 1893, George Wacaser, borrowed from appellant, at extravagantly usurious rates of interest, sums of money, aggregating \$1,403, for which he gave notes amounting to \$1,603.33. On January 15, 1894, all the notes were taken up and embodied in two other notes as renewals, which were also taken up on April 27, 1894, and embodied in one note for \$1,939.31 as a renewal. On April 27, 1895, the last named note was taken up and a new one executed for \$2,041.26, made payable to J. M. Shepherd, a young son of appellant who was clerking at the bank. That note was secured by chattel mortgage on corn which was sold and the net proceeds, \$622.16, paid on the note. On November 3, 1895, notes for \$1,000 and \$569.17, respectively, were executed as a renewal of balance of the notes for \$2,041.26, made payable to appellant, and Wacaser at the same time borrowed \$150 more of appellant and gave to him a note for \$160.87.

Subsequently there were payments and renewals from time to time made, so that the indebtedness on the 2d of May, 1896, amounted to \$758.12, for which a note, payable to appellant and due in three months, was executed. That note was taken up on the third of August, 1896, and a new one executed instead, of \$833.92, made payable to S. L. Shepherd, a sister-in-law of appellant, and by her indorsed to appellant. It is the note sued on.

The sum total of the payments made from time to time by Wacaser exceeded by several hundred dollars the amount of money actually received by him. But it is contended

that they can not be applied in payment of this note for the reason that it is not a renewal of the indebtedness. The fact that one of the notes, the note for \$2,041.26, was made payable to appellant's son, would not relieve appellant from the operation of the usury statute, if the note really belonged to appellant. The law will tolerate no such shift or devise. Evidently the jury regarded that transaction as a mere shift or device, and we are not inclined to say they were wrong in so regarding it. The same may be said as to the note made payable to Mrs. Shepherd. The frictional question of fact presented to the jury was whether the money furnished Wacaser from time to time was appellant's and the note in suit a mere renewal. The testimony of Wacaser and the peculiar circumstances attending the various transactions were sufficient to justify the conclusion that the notes were at all times for indebtedness due appellant, and that the one in suit was made payable to Mrs. Shepherd to enable him to escape the operation of the usury statute. Appellant and his son both testify in denial, but it was a question of fact for the jury, and as they were properly instructed, we shall not interfere. Judgment affirmed.

**Columbus Mutual Life Association v. Jesse H. Plummer
and Lucy D. Plummer.**

1. **INSURANCE**—*When a Cause of Action Arises.*—When an insurance company refuses to pay the policy, and bases its refusal upon the ground of no liability to pay in any event, the beneficiaries have the right to sue at once.

2. **PRACTICE**—*Setting Aside Judgment by Default.*—The setting aside of a judgment by default and allowing pleas to be filed rest in the sound discretion of the court, and unless it clearly appears that the refusal of the court was an abuse of the discretion, this court will not interfere.

3. **SAME**—*Denying Application to Overrule Judgment by Default.*—Where a defendant elects to stand by his demurrer to a declaration, when it is overruled and judgment by default is entered against him because of his refusal to plead, it is not an abuse of the court's discretion to deny an application made nine days after, to set aside the judgment and let in a defense known to the defendant at the time of announcing his election to stand by his demurrer.

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4. JUDGMENT BY DEFAULT—*Defendant Asking to Have it Set Aside Must Show Specific Facts.*—A defendant asking to have a judgment by default against him set aside, so as to allow a defense, must show, by sworn statements, specific facts that constitute a defense on the merits. A statement "on information and belief" is not sufficient.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

JOHNSON & McDANNOLD, attorneys for appellant.

WILSON & BUCKINGHAM, attorneys for appellees.

When the company refuses to pay the policy, and bases such refusal on grounds of no liability to pay in any event, it can not, on being sued, avail on time limit. It waives the time limit, and beneficiaries have the right to sue at once. *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Williamsburg v. Cary*, 83 Ill. 457; *Continental Ins. Co. v. Ruckman*, 127 Ill. 364; *Mechanics Ins. Co. v. Hodge*, 149 Ill. 298.

The setting aside of a judgment by default is a matter resting wholly in the sound discretion of the court; and on review an appellate tribunal will not interfere, unless it clearly appears that such discretion has been abused by the court, to the manifest injury of the complaining party, and when it is clear that gross injustice has been done by the action of the court below. All presumptions favor the court below. *Peoria, etc., Ry. Co. v. Mitchell*, 74 Ill. 394; *Franz v. Winne*, 6 Ill. App. 82; *Hitchcock v. Herzer*, 90 Ill. 543; *Constantine v. Wells*, 83 Ill. 192.

One who seeks to set aside a judgment rendered by default against him must show by the sworn statement of some person such facts as constitute a defense to the action on merits, and that defendant has used diligence to obtain such facts and make his defense in apt time. *Mendell v. Kimball*, 85 Ill. 582; *Hitchcock v. Herzer*, 90 Ill. 543; *Constantine v. Wells*, 83 Ill. 192; *Little v. Allington*, 93 Ill. 253.

MR. JUSTICE HARKER delivered the opinion of the court. This is a suit in assumpsit, brought by appellees or

policy of insurance on the life of their mother, Lillie Plummer, issued by appellant. On the 22d of October, 1898, a demurrer to the amended declaration was overruled. Appellant stood by its demurrer and refused to plead; whereupon a default was taken and a judgment rendered for \$1,000, from which order an appeal was prayed. On the 31st of October appellant filed a motion to set aside the default and judgment and for leave to plead. On the 19th of November it presented a plea of the general issue and six special pleas supported by affidavit, but the court refused to vacate the judgment and allow the pleas to be filed. Exceptions were taken, and this appeal was prosecuted for the purpose of reviewing the action of the court in overruling the demurrer to the declaration and in refusing to vacate the judgment and allow the pleas to be filed.

It is objected to the declaration that it does not show a compliance with the terms of the policy in making proofs of death, and that it was filed within ninety days after the death of deceased, when the policy provides for the payment of the amount named ninety days after receiving satisfactory proofs of death.

The declaration sets out in detail what proofs of death were furnished, and avers that they were accepted by the association as complete and satisfactory. It further avers that the association, after receiving the proofs, refused to pay the sum of money mentioned in the policy and denied any liability. In view of these averments the only legal action for the court was to overrule the demurrer.

When appellant refused to pay the policy and based its refusal upon the ground of no liability to pay in any event the beneficiaries had the right to sue at once. *Ætna Ins. Co. v. Maguire et al.*, 51 Ill. 342; *Williamsburg Ins. Co. v. Cary*, 83 Ill. 453.

The setting aside of a judgment by default and allowing pleas to be filed rest in the sound discretion of the court; unless it clearly appears that the refusal of the court was an abuse of the discretion this court will not interfere. Where a defendant elects to stand by his demurrer to a declaration when it is overruled, and judgment by default is entered

against him because of his refusal to plead, it is not an abuse of the court's discretion to deny an application made nine days thereafter to set aside the judgment and let in a defense known to the defendant at the time of announcing his election to stand by his demurrer. Unquestionably the defense proposed by appellant's first four pleas was known at the time the demurrer was overruled. The special matter set up related to the furnishing of satisfactory proofs of death.

The last three pleas offered set up the special defense that the policy was void by reason of false and fraudulent statements contained in the application of Lillie Plummer at the time and prior to applying for insurance. They were not sworn to, but there was tendered with them the affidavit of James H. Hogue, stating that he was the superintendent of appellant, and as such had charge of the home office; "that since judgment was rendered in the above entitled cause certain information had come to his knowledge which related to said claim which led him to believe that the said Lillie B. Plummer made an incorrect statement in her application for certificate of insurance in said company and stated in her application that she was in good health, when in truth and in fact she was suffering from a tumor which caused her death."

A defendant asking to have a judgment by default against him set aside so as to allow a defense must show by sworn statements specific facts that constitute a defense on the merits. *Rich v. Hathaway*, 18 Ill. 548; *Constantine v. Wells*, 83 Ill. 192; *Roberts v. Corby*, 86 Ill. 182; *Little et al. v. Allington*, 93 Ill. 253.

Such facts must be stated positively. A statement "on information and belief" is not sufficient. *S. & N. W. Ry. Co. v. Ross*, 88 Ill. 179; *Hitchcock v. Herzer*, 90 Ill. 543.

The affidavit of Hogue merely stated that certain information had come to his knowledge which led him to believe that Mrs. Plummer had made incorrect statements in her application as to her health, etc. It was insufficient.

Seeing no error in the record the judgment will be affirmed.

Harry Madison, Executor, v. Frank Cabalek.

1. **AGENT—Loan Broker Negotiating Loans upon Real Estate.**—It would be a very dangerous rule to hold that a loan broker, engaged in negotiating loans upon real estate, should be regarded as the general collecting agent of a lender from whom he has obtained money for a client, merely because other borrowers had frequently before obtained money from him and collected interest coupons in certain instances.

2. **SAME—Authority to Loan is Not Authority to Collect.**—Authority of an agent to loan the money of his principal and take security for its payment does not authorize him to collect his principal's money so loaned.

3. **SAME—Authority to Receive Interest on a Negotiable Instrument.**—An agent intrusted with authority to receive interest on a negotiable instrument, or the principal when due, is not authorized to receive the principal before due.

4. **NEGOTIABLE PAPER—Duty of Maker at Time of Payment.**—With reference to negotiable paper the maker must, at his peril, ascertain at the time of payment whether the person to whom he makes payment is the owner of the paper.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Douglas County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 18, 1899.

T. W. ROBERTS and I. A. BUCKINGHAM, attorneys for appellant.

JOHN H. CHADWICK and ECKHART & MOORE, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This was a suit against appellee on a promissory note for \$1,200 executed by him to Oscar H. Sloan and by Sloan indorsed and turned over to appellant's testate, John M. Madison. The defense of payment was made and it prevailed in a trial by jury. It is urged for grounds of reversal that the verdict is against the evidence and that the court gave improper instructions.

From the evidence contained in the record, it appears

that Patrick C. Sloan was a loan broker at Tuscola, Illinois, engaged in negotiating loans upon real estate security. Appellee applied to him for a loan of \$1,200, and on February 1, 1895, executed a note for that amount and interest at the rate of seven per cent, payable in three years to Oscar H. Sloan, and secured by mortgage on certain farm lands in Douglas county. Attached to the note were three interest-bearing coupons for \$84 each. After the notes were executed, Oscar Sloan indorsed them in blank, and they were in that condition turned over by Patrick Sloan to John M. Madison, from whom the \$1,200 was obtained to make the loan. The amount of the first coupon when due was paid by appellee to Patrick Sloan, who paid it over to Madison, took up the coupon and surrendered it to appellee. A short time afterward appellee secured through Sloan a loan of \$3,400, giving mortgage on the same land. There was deducted from the \$3,400 the amount due Madison on the \$1,200 loan and the balance paid to appellee. Appellee, at the time, asked Sloan for the notes and mortgage which had been given for the \$1,200 loan. Sloan informed him that he did not have them but would get them. None of the \$1,200 was ever paid to Madison and no information was ever given him about the new loan.

On the 13th of July, 1896, Madison died, leaving a will, and into the hands of his executor came the \$1,200 note and the two remaining coupons. On the 1st of February, 1897, Sloan paid the second coupon. In March of that year he failed, and is now insolvent.

It is contended that Patrick C. Sloan was the agent of John M. Madison in making the \$1,200 loan and in receiving the amount due on it when it was deducted from the \$3,400 loan. The decision of the case hinges entirely upon that contention. The evidence shows that it was the custom of Sloan when a borrower made application to him for a loan to make the note and mortgage payable to his brother, Oscar H. Sloan, or a brother-in-law, and when a party was found willing to furnish the money, the note was

indorsed by the payee and turned over to the lender. In that way numerous loans were secured from Madison and other parties. The evidence also shows that in many instances he would receive the money due on interest coupons, pay it over to the lender, receive the coupon in return and surrender it to the borrower. In most cases, the name of the lender was not disclosed to the borrower. It does not appear that the name of Madison was disclosed to appellee either at the time of receiving the \$1,200 or at the time of deducting it from the \$3,400 loan. These are the facts on which the appellee founds his contention that Sloan was the agent of Madison.

Opposed to the contention of appellee, there is the testimony of Sloan that he was acting for appellee in negotiating the loan for \$1,200. Of course, his testimony on that point should have but little weight if it is apparent, from other evidence, that he was either a general or special agent of Madison. There is no evidence whatever that he was a special agent of Madison to make that particular loan; but it is insisted that the course of dealing between them was such as to make him Madison's general agent to make and collect loans. In our opinion it would be a very dangerous rule to hold that a loan broker, engaged in negotiating loans upon real estate, should be regarded as the general collecting agent of a lender from whom he has obtained money for a client merely because he frequently before, for other borrowers, had obtained money from him and collected interest coupons in certain instances.

Had Sloan been the general agent of Madison with authority to loan his money and take real estate security, or his special agent to make this particular loan, it does not follow that he was authorized to collect. Authority to an agent to loan the money of his principal and take security for its payment does not authorize the agent to collect his principal's money so loaned. *Cooley v. Willard*, 34 Ill. 68; *Stiger et al. v. Bent*, 111 Ill. 328.

The general rule with reference to negotiable paper is that the maker must, at his peril, ascertain at the time of pay-

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ment whether the person to whom he makes payment is the owner of the paper. In this case Oscar H. Sloan was made the payee. By inquiring of him, appellee would have ascertained whether he was the holder of the note, and if not, who was. He did not take that precaution, but paid to the man who had negotiated the loan, and who informed appellee at the time, that he did not have the note. It is a great hardship on appellee to be compelled to pay the note twice, but it is attributable solely to his own negligence and the rascality of the man to whom he paid the money and trusted to procure the note for him.

The note was paid to Sloan nearly two years before maturity. The fact that he had received payment of overdue interest coupons did not justify appellee in paying the principal note before maturity. He would not have been justified in so paying it even if Sloan had direct authority from Madison to receive interest money when due. An agent intrusted with authority to receive interest on a negotiable instrument, or the principal when due, is not authorized to receive the principal before due. *Thompson et al. v. Elliott*, 73 Ill. 221; *Thornton v. Lawther*, 169 Ill. 229; *Mechem on Agency*, Sec. 380; *Smith et al. v. Hall*, 19 Ill. App. 17.

Of course, if the evidence in any particular case should show that the agent had full authority from his principal to make loans on his own judgment, to extend time of payment, determine the lengths of loans, collect the principal when due and re-loan it, pay taxes, and to take general supervision of his principal's business without limitation in writing, then the implication could be indulged that he had authority to receive payment of loans before due. No such case is presented by the evidence here, however.

We do not care to discuss in detail the instructions complained of by appellant. It is sufficient to say that they are contrary to our views of the law as we have expressed them in this opinion. The judgment will be reversed because of error in giving them and because the finding of the jury is against the law and evidence. Judgment reversed and remanded.

86 454
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Chicago & Alton R. R. Co. v. Charles F. Merriman.

1. **PRACTICE—Verdict Received by Different Judge.**—It is not an infrequent occurrence for a verdict to be received by a different judge than him who tried the case, and where the jury is present when the verdict is received and is polled, and where there is no doubt that it was the determination of the jury, the action of the court in receiving it is not erroneous.

2. **MASTER AND SERVANT—Servant Using Defective Machinery—When Negligence.**—To charge an employe with negligence in using a machine or appliance known to him to be defective, it must also be shown that he knew that the defect rendered its use dangerous.

3. **SAME—Employe Must Note and Report Defects.**—An employe must be careful to note and report any defects or want of repair in the appliance he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances he may expect the employe will promptly call attention to any defects that may appear or any repairs that may become necessary, so far as due care on his part will discover the same, and an employe who fails in this does not exercise ordinary care for his safety.

4. **INSTRUCTIONS—Disregarding Knowledge of Master, of Defects and Dangers.**—An instruction which disregards the knowledge of the master of both the defect and its dangers, and of what effect a lack of such knowledge will have upon his liability, is erroneous.

Action in Case, for personal injuries. Appeal from the Circuit Court of McLean County; the Hon. JAMES H. MOFFETT, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed September 20, 1899. Rehearing denied.

C. L. CAPEN and A. E. DEMANGE, attorneys for appellant; WM. BROWN, General Solicitor, of counsel.

EWING, WIGHT & EWING and FIFER & BARRY, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee sued appellant for personal injuries, as the result of negligence, received while acting as fireman for appellant on one of its locomotives, while he was in the exercise of ordinary care for his own safety. It is charged that the

railroad company permitted this engine to become and remain out of repair, with a cracked right driving box and main pin, which latter broke while in operation, causing the injuries; that the company did not inspect the engine, and employed incompetent inspection for the purpose; and that appellant also maintained its road bed, at the point of the accident, in such a manner as to be the cause of these injuries.

Upon a trial by a jury, a verdict and judgment was rendered against appellant for \$7,500, and having taken an appeal to this court, it assigns various errors upon the record as ground of reversal.

Among other things urged against the action of the Circuit Court in rendering the judgment, is the fact that the jury was sent out at 4:30 o'clock, Saturday evening, with instructions upon reaching a verdict to write it out, seal it, and deliver it to the officer in charge, who should return it to the court when in session, there to be opened and received, and the jury, upon so doing, to separate and be present at the entering of the verdict; which arrangement was not consented to by appellant, and specifically objected to by it; and the further facts that the jury did reach their verdict on the following day, Sunday, and did what the court ordered on that contingency; that such verdict was received by the court, with another judge than he who tried the case presiding, and that a newspaper published statements relative to the finding of the jury and the way it was reached, before the verdict was received by the court. Counsel claim this action of the court was prejudicial to their case; but nothing in the record is shown or preserved to maintain that position, and the force of the contention is therefore lost. It is not shown that appellant was injured in any manner by such a course; and unless that be shown it can not be presumed reasonably, and we should be very loth to condemn a judicial act which the court probably had the best of reasons for ordering. C., C., C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474.

So far as the verdict being received by a different judge

is concerned, it is not an infrequent occurrence, and it may be added that it is the court which receives the verdict, be the judge whom he may. The newspaper does not purport to have received intelligence from any juror. Furthermore, the jury was present when the verdict was received, and was polled; that it was the determination of the jury admits of no doubt. In view of these matters, the action of the court is not subject to the criticism imposed.

It appears from his statement in evidence that appellee, in his capacity as fireman, on May 7, 1897, returned to Bloomington from a run with a freight train, with engine 190, and Watkins, his regular engineer; and that in his presence the engineer inspected the machine and called his attention to the defective driving box complained of, and stated that he had reported the defect. The next morning, May 8th, he made ready to go out on the engine, but upon arriving on it, found a different engineer, Franz, in charge. He did not mention the matter of the driving box to Franz, who inspected the machine before going out, and made no inspection of it himself, and knew of no danger from its condition. They proceeded to the Lawndale curve, where the right main crank-pin broke, letting down the right main and side rods; within a few seconds the left pin also broke, letting down its rods. Appellee stood upon the deck of the machine during its successive jumps, due to the free end of the rod on the right side plunging into the ground; but as the drop from the first jump at the end of the rod on the left side struck the ground he says he was thrown backwards off the engine, down an embankment, and as he passed through the air, the left rod struck his leg, causing such a fracture that the limb was afterward amputated, and other injuries resulted upon his striking the ground. He further states that in the instant before the breaking of the right crank-pin, the engine gave a lurch as if to show that it ran upon a poorly maintained track. There is a grave conflict in all the evidence upon the material allegations of the plaintiff's declaration.

It is insisted that the court erred in admitting evidence

C. & A. R. R. Co. v. Merriman.

of the condition of appellant's road-bed, at the point where it is alleged to have caused the accident, for too great a period before and after the occurrence. It seems the evidence on this point covers a period two months prior to and ten days later than that date. Of course the application of a general rule would limit the admission of evidence on this point to a reasonable period before and after the event, and while we favor the position that proof of its condition within a much shorter period prior to the time in question would be sufficient, still we do not in this case consider this matter complained of reversible error.

We have examined the instructions which have been made the subject of complaint in the case, and as regards the most of them we find they are fairly accurate statements of the law applicable to the issues, and of those refused the principles contained were stated in others given when applicable. But among them there was asked and given for appellee the following instruction :

“If you believe from the evidence, and under the instructions of the court, that the defendant was guilty of negligence with reference to the driving box, as charged in some count of the plaintiff's declaration, and that by reason thereof the plaintiff was injured through the defendant's carelessness and negligence in that regard, while in the exercise of ordinary care for his own safety, then you are instructed that knowledge on his part as to the condition of the driving-box, on the day prior to the injury, will not bar a recovery under such counts of the declaration, providing you further believe from the evidence that he did not know, and by the exercise of ordinary care, could not reasonably have anticipated the danger likely to result therefrom.”

The case of *Knapp v. C. & E. I. R. R. Co.*, 176 Ill. 127, is cited in support of this instruction; and there at page 129, the court say: “To charge an employe with negligence in using a machine or appliance known to him to be defective, it must also be shown that he knew the defect rendered its use dangerous.” And it is said that the instruction is good upon the theory that there is a well organized legal distinction between knowledge of defects

machinery and knowledge as to the effect which may reasonably be produced by such defects. True, that is a sound distinction; but the difficulty is to apply it to this instruction. In the case cited the injury was caused by the sudden jamming of cars together while the conductor, who was injured, was handling the defective coupling; and it does not seem that he was using the appliance in an ordinary way, but inspecting it and trying to make a better and stronger connection by straightening the pin. It will be observed also that no such instruction as the one under discussion was before the court there. By it the jury was told, in effect, that if appellant was negligent in having a defective driving box, which resulted in injury to appellee, under the declaration, he could recover, notwithstanding the fact that he knew of the defect, but did not know or could not reasonably have anticipated, the danger of it. Thus it utterly disregarded the knowledge of appellant of both the defect and its dangers; and of what effect a lack of such knowledge would have upon its liability. That element is primarily essential to that liability, and is so recognized by the declaration in the case which recites, relative thereto, that appellant "knew or ought to have known it." For if appellant could not, by the use of reasonable care, have learned of the danger, and in fact, did not so learn, then wherein would be its liability? In the case of *P. D. & E. Ry. Co. v. Hardwick*, 48 Ill. App. 562, at page 567, we say, quoting the citation, "If deceased could not learn the place was dangerous by reasonable care, how can appellant be held liable because it did not learn the fact? Reasonable care, when exercised by the company, could only reach the same results that would be attained by the use of the same care by deceased. If, by his care and diligence, he could not learn that it was dangerous, it is unreasonable to hold appellant liable, where, by the use of the same care, it could not learn there was any danger."

"It is familiar doctrine in this State that an employe must be careful to note and report any defects or want of

repair in the appliances he is required to use. If the employer uses reasonable care to furnish safe and suitable appliances he may expect the employe will promptly call attention to any defect that may appear or any repairs that may become necessary, so far as due care on his part will discover the same, and an employe who fails in this, does not exercise ordinary care for his safety."

The question in the case was not alone whether appellee knew of the defective appliance and of its dangers, or might reasonably have known the same, but also whether appellant knew, or might have known the same; and this objection does not seem to be cured by anything contained in other instructions. So it is plain the instruction is out of harmony, with a tendency to mislead; and, owing to the state of the evidence, in its conflicting character, and the consequent necessity for accurate instructions, we are constrained to pronounce the giving of it erroneous.

The matter of the cross-error laid by appellee upon the refusal of the court to admit evidence tending to show the condition of the track in October, after the accident, and to prove that it was substantially the same way at the time of the accident, remains to be considered. Regarding proof of this kind we have already expressed our opinion in this case, from which it may be seen we do not favor appellee's contention; it is too remote from the question really at issue. If appellee could, as he avers, show its condition at the time of the injuries, in May, that, we think, would be the best evidence; and whether it remained, as he suggests, until October, would certainly add nothing, nor make his proof stronger so far as the issues are concerned. We do not think the cross-error well taken.

Having found the error indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

**People, etc., use of County of Pike, v. Addison Cadwell
et al.**

1. **RECORD—Imports Absolute Verity.**—The record of a court of record imports absolute verity upon its face, and can not be impeached by oral statements in a mere collateral way.

Appeal from the Circuit Court of Pike County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

J. D. HESS, EDWIN JOHNSON and WILLIAM MUMFORD,
attorneys for appellant.

A. G. CRAWFORD, attorney for appellee.

OPINION PER CURIAM.

The only errors assigned upon the record here are that the trial court rejected proper evidence offered by appellant, and that the court erred in rendering judgment against appellant in bar of the action.

It appears from the bill of exceptions contained in the record that appellees introduced the record of a former judgment of the Circuit Court of Pike County, between appellant and appellee Cadwell, to which no objection was made. Appellant then called as a witness the clerk of that court, who was asked when such record was made, and also whether such record was made by the clerk or deputy from the judge's minutes, or partly from directions or information from persons other than the judge of the court, to which the court sustained objections and the appellant excepted. There appears no question that the record introduced was the record of the Circuit Court of Pike County, and being such it imported absolute verity upon its face, and it was not material when the clerk in fact wrote the record, for when written it alone could speak for itself, and it would be a dangerous rule to adopt that the clerk or any other per-

L. E. & W. R. R. Co. v. Murray.

son could, by oral statement, contradict or impeach, in a mere collateral way, as this would be, the integrity of the record of a court of general jurisdiction. We think the court properly rejected such evidence, and this being the only exception preserved in the bill of exceptions concerning the admission or rejection of evidence, the first assignment of error is therefore unavailing to effect a reversal of the judgment.

The second and only remaining error assigned is that the court erred in rendering such judgment. In order to raise this question for the consideration of this court appellant should have taken and preserved in the bill of exceptions an exception to the finding or judgment of the court, a jury having been waived. This was not done, and by the well settled law we are, for such reason, forbidden to consider the questions argued by counsel under this head. *Retzer v. Gourley*, 80 Ill. App. 630, and cases cited. The judgment of the Circuit Court will therefore be affirmed.

Lake Erie & W. R. R. Co. v. Eliza Murray.

1. **EVIDENCE**—*Sustains the Verdict*.—The court is of the opinion that the evidence fully sustains the verdict and affirms the judgment.

Action for Damages Caused by Fire.—Appeal from the Circuit Court of McLean County; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

TIPTON & TIPTON, attorneys for appellant; **JOHN B. COCKRUM**, of counsel.

D. D. DONAHUE, attorney for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was a suit commenced by the appellee against the appellant before a justice of the peace in McLean county to

recover damages caused by fire which burned some fences and other combustible property of appellee, situated upon her farm, which adjoined the right of way of the appellant, the appellee claiming that the fire was communicated to her farm by reason of the negligence of the appellant.

The appellee recovered judgment in the justice court for \$150 damages and \$10 attorney's fees. The appellant appealed to the Circuit Court of that county, where the case was tried by jury, and a verdict and judgment rendered for the appellee for \$149 damages and \$30 attorney's fees.

The appellant brings the case to this court by appeal, and urges us to reverse the judgment of the Circuit Court upon the grounds that the verdict was contrary to the evidence; the court admitted improper and rejected proper evidence; the court gave to the jury improper and refused proper instructions.

The evidence shows that appellee owns a farm north of and adjoining the right of way of the appellant, upon which she had fences and other combustible property; that a fire started upon the right of way of defendant, where it joins appellee's farm, and from there communicated with the combustible material on her farm, and damaged her fences and other combustible property thereon.

There was a slight conflict in the evidence as to whether or not there was any dry grass, dead weeds or other dangerous combustible material where the fire started, but the decided weight of evidence is to the effect that there was. The evidence also shows that the amount of damages the fire caused to appellee's fences and other combustible property was at least \$149.

The evidence, in our opinion, fully sustains the verdict; and after a careful examination of the rulings of the court upon admitting and rejecting evidence, we find it did not commit any prejudicial error against the appellant in any one of them, but, upon the whole, such rulings were fair and free from reversible error.

The appellant also complains that the court gave improper

Forest City Ins. Co. v. Eaton.

and refused proper instructions, but upon a careful examination of the instructions, both given and refused, and of which complaint is made, we find that those given do not contain prejudicial error upon those questions upon which the evidence was conflicting, and those refused were either covered by others given, or were not responsive to the evidence; therefore the court did not commit the errors complained of in that regard.

Finding the court committed no prejudicial error against the appellant, and that the verdict and judgment are fully supported by the evidence, we affirm the judgment.

Forest City Ins. Co. v. Laura Eaton, Adm'x, etc.

1. **INSURANCE**.—*Change of Title by Death Does Not Work a Forfeiture of the Policy.*—The death of the assured before loss does not work a forfeiture of a fire insurance policy under a condition that it shall be void if any change takes place in the title or possession of the property insured.

Assumpsit.—Appeal from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

CONKLING & GROUT, attorneys for appellant.

MCGUIRE & SALZENSTEIN, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This is an appeal to reverse a judgment of the Circuit Court of Sangamon County, rendered in an action of assumpsit by the appellee as administratrix of the estate of Henry Bumhoff, deceased, against the appellant. The declaration counted upon a policy of insurance issued to appellee's decedent on January 18, 1894, by appellant, in which said decedent was indemnified against loss by fire on certain property, among which was \$300 on a frame barn, the policy to expire January 8, 1899. The policy was set out in full, and among other things provides that appellant

"does insure Henry Bumhoff against loss or damage by fire * * * and the said company hereby agrees to make good unto the said assured, his executors, administrators and assigns, all such immediate loss or damages, not exceeding in amount the sum or sums insured, as above itemized, nor the interest of the assured in the property, as shall happen by fire." It there provides that "if, without the consent of the secretary of this company indorsed hereon, * * * any change takes place in the title, possession, or interest of the accused in the above mentioned property, or if the assured shall not be the sole and unconditional owner of said property, both at law and equity, or if this policy shall be assigned, then in each and every such case this policy shall be void."

The declaration averred that Henry Bumhoff was the owner of the property described in the policy when the policy was issued, and continued to be such owner until he died, when the appellee was duly appointed the administratrix of his estate in the manner provided by law, and is acting as such; that on January 22, 1897, after the death of said Henry Bumhoff, the said barn was totally destroyed by fire, notice of which was given by appellee to appellant on January 23, 1897; that Henry Bumhoff in his lifetime, and appellee and his heirs at law since his death, have in all respects kept and performed the conditions contained in the policy to be by him or them kept and performed; and that proofs of loss were furnished by appellee to appellants, as provided in said policy, whereby the appellant became liable to pay said sum of \$300 to appellee, and for which she sued, etc. The appellant demurred to the declaration, and the court overruled it, and upon the appellant electing to stand by its demurrer the court gave judgment for the appellee against the appellant for \$300 and costs, to reverse which this appeal is prosecuted.

In their brief filed in this court, at page 3, counsel for appellant say, "No questions are raised under the pleadings on proofs of loss or any technical breaches of the conditions of the policy; but the company denies the right of the ad-

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ministratrix, as such, to recover under the terms of the policy, claiming that by the death of Henry Bumhoff such a change took place in the title, possession or interest of the assured, Henry Bumhoff, in the above mentioned property, as rendered the policy void."

The policy of insurance in question in this case is exactly like the one involved in the case of Forest City Insurance Co. v. James Hardesty, Adm'r, 182 Ill. 39; the liability of the company in that case was upon a similar state of facts as those in the case at bar, and the court held the company was liable; so we must hold that the ruling in that case controls here, and compels us to affirm the judgment of the Circuit Court in this case. Judgment affirmed.

McClure & Taylor v. D. M. Osborne & Co.

1. **BANKS AND BANKING**—*Duty upon Receiving Notes for Collection.*—When a banker receives a note for collection he is bound to return it or to account for the amount of its proceeds.

2. **AGENT**—*Evidence of Authority.*—The authority of an agent can not be established by his own unsworn statement, and proof of his declarations are inadmissible to charge a principal until after there is a *prima facie* showing of his authority by other evidence.

3. **APPELLATE COURT PRACTICE**—*Instructions Must be Abstracted.*—Where the appellant does not abstract instructions given for him the court will not consider those refused.

Assumpsit.—Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

CHARLES M. PEIRCE, attorney for appellants.

C. L. CAPEN and E. E. DONNELLY, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellee, a corporation dealing in farm machinery at Chicago, held a note for \$60, payable to its order on the 1st of October, 1894, signed by Louis Arbogast, then a resident

of McLean county. On the 26th of March, 1895, the note was sent to appellant's bankers, doing business at Arrow-smith, McLean county, for collection, who mailed a receipt for it to appellee. Subsequently, Arbogast paid the note to a man who called upon him in his field; but who the man was or how he came into possession of the note, the evidence does not disclose.

After ascertaining that Arbogast had paid the note and had it in his possession, and after receiving the denial of appellants that they had collected it or even received it for collection, this suit was brought. A trial in the Circuit Court resulted in a verdict and judgment in favor of appellee for \$70.44.

It is clear that if the man to whom Arbogast had paid the note was an agent of appellants, or had obtained possession of it while it was held by them for collection, they are liable to appellee. When a banker receives a note for collection he is bound to return it or to account for the amount of its proceeds. Daniel on Negotiable Instruments, Sec. 327; Morse on Banks, 341; Selz v. Collins, 55 Mo. App. 55.

Appellee proved that the note was never received by it after being sent to appellants for collection, and that not one of its agents, having anything to do with the collection of notes, had it in his possession after it was sent to appellants.

It is contended that the court erred in refusing to allow appellants to prove that the man who presented the note to Arbogast and collected it, represented that he was the agent of appellee. The authority of an agent can not be established by his own unsworn statement, and proof of his declarations are inadmissible to charge a principal until after there is a *prima facie* showing of his authority by other evidence. Mechem on Agency, Sec. 716; Evans on Agency, 157; Callaghan v. Myers, 89 Ill. 566; Proctor v. Tows, 115 Ill. 138.

We are unable to see any substantial error in the instructions given for appellee. Complaint is made of the refusal

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of certain instructions offered by appellants, but as counsel for appellants have not abstracted those given for them, we shall not consider those refused. If an appellant desires to have the action of the trial court in refusing instructions reviewed in the Appellate Court he must abstract the instructions given, so that it may be ascertained whether correct principles in refused instructions are not contained in those given.

A careful review of the evidence in this case satisfies us that appellants received the note in question and lost it, or by some negligence permitted it to get into the hands of an unauthorized person, who collected it. They are, therefore, liable, and the judgment should be affirmed.

Campbell & Oakman v. W. H. McFarland.

1. **FORCIBLE ENTRY AND DETAINER—Proof of Service and Notice.**—The service of the notice in suits of forcible entry and detainer may be proved by parol.

2. **SAME—What is Sufficient Proof of Notice.**—Where the plaintiff, in an action of forcible entry and detainer, delivered to the sheriff of the county for service, a notice to surrender possession, which was on the same day handed to a deputy, who testified that he delivered a copy to the defendants, and the testimony of the plaintiffs fixed the date and identified the copy of a notice produced upon the trial as a true copy of the one handed to the deputy, it was held that the evidence that such a notice was served was sufficient.

Forcible Entry and Detainer.—Appeal from the Circuit Court of De Witt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 18, 1899.

MOORE, WARNER & LEMON, attorneys for appellants.

WILLIAM BOOTH, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court. This is an action of forcibly entry and detainer com-

menced by appellee to recover possession of a business house and lot in the city of Clinton. The case was tried by the court without a jury and judgment rendered in favor of appellee. A reversal is sought because of insufficiency of notice to surrender possession and because of a judgment rendered against appellee in a former suit against appellants to recover possession of the same property.

Appellee leased the property to Lewis Campbell and Wm. C. Campbell, doing business as the "Campbell Furniture Company," at a yearly rental of \$650, lease to expire November 1, 1896. The lease was not renewed at the date of its expiration, but the Campbells continued in possession until May, 1898, when Lewis Campbell sold his interest in the furniture business to appellant, Clem Oakman. The new firm continued in possession and business under the firm name of Campbell & Oakman. On the 29th of August, 1898, appellee delivered to the sheriff of the county for service upon appellants, a notice to surrender possession on the 1st of November, 1898. The notice was on the same day handed to a deputy, who testified that he delivered a copy to each of appellants on the same evening and made a return on the notice which he lodged in the sheriff's office. When the case came on for trial, a new sheriff had been elected, and the notice with the return indorsed had been mislaid and could not be produced. In his testimony, the deputy could not state the contents of the notice nor give the date of its service; but he testified that he served it on the same day that it was handed to him, and the testimony of appellee fixed that date as the 29th of August, and identified the copy of a notice produced upon the trial as a true copy of the one handed to the deputy. The notice which the law requires in this kind of a case is the sixty day notice provided by section 5 of the Landlord and Tenant Act, Hurd's Revised Statutes, 1022. The evidence is sufficient that such a notice was served.

The judgment, which, it is claimed, was a bar to this action, was rendered in the County Court in a suit commenced before a justice of the peace and carried to that court on appeal.

Estate of Casner v. Stafford.

It could not be successfully interposed in bar of this action unless it appeared that it was a suit commenced upon a sixty days notice and the issues were the same as here. That it was, does not appear from the evidence. From what does appear, that suit was commenced on the thirty days notice provided by section 6 of the act mentioned.

The trial court took the same view of the case that we do, and therefore properly refused the tendered propositions of law. Judgment affirmed.

**In the Matter of the Estate of Lewis B. Casner, Insolvent,
Louis A. Mills, Assignee, v. Orlando C. Stafford.**

1. **PAROL EVIDENCE—To Contradict Written Agreements.**—The rule excluding parol evidence in construing written agreements, does not apply where the original contract was verbal and entire, and a part only is reduced to writing.

2. **BILL OF EXCEPTIONS—Presumptions When it Does Not Contain All the Evidence.**—When the bill of exceptions does not purport to contain all the evidence the court can not enter into the question of the weight of the evidence, nor of the want of sufficient evidence, for the presumption is, in such state of record, that there was before the trial court at the hearing sufficient competent evidence to warrant the court in every ruling and finding that is dependent on evidence for its support.

Voluntary Assignments.—Appeal from the County Court of Macon County; the Hon. WILLIAM HAMMER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

MILLS & FITZGERALD, attorneys for appellant.

OUTTEN & ROBY, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was a petition in the County Court of Macon County, by appellee against Louis A. Mills, assignee of Lewis B. Casner, insolvent, praying for an order directing such assignee to pay over to appellee a dividend of twenty-

five per cent which that court had ordered to be paid the creditors of said insolvent, out of assets then in the hands of the assignee.

That appellee was creditor of the insolvent estate to the amount of \$1,652.66, and that he had duly presented and proved his claim is admitted, but appellant contends that as assignee of such estate he has the right to set off against any dividends due to appellee certain sums which have been paid out of the estate as dividends on certain indebtedness, for which, appellant claims, appellee was jointly liable with said insolvent. Appellee denies any liability to contribute to the insolvent estate on account of its payments on such indebtedness, and avers that the insolvent, prior to his assignment, for a valuable consideration, assumed and agreed to pay all of such indebtedness, to relieve appellee therefrom, and to save and keep him harmless in respect thereto. This raises an issue of fact, which is the controlling question in the case.

Upon the trial in the County Court much evidence was introduced *pro* and *con*, and the court found and ordered as follows:

"The court finds that Casner, assignor, prior to his assignment, entered into an agreement with Stafford, by which Casner bound himself, for good and valuable considerations, to pay all of the liability of the Decatur Brick & Tile Company and all the Danville Brick & Tile Company, in which said Casner was in any way liable, either as maker, joint maker, indorser, guarantor, or otherwise, and that all the claims upon which defendant, assignee, asks that set-off shall be allowed, as against the claim of Stafford, are liabilities of the Decatur Brick & Tile Company, or the Danville Brick & Tile Company, and are liabilities which were included in the aforesaid agreement between Casner and Stafford, and that by reason of said agreement, said Stafford is relieved from liability as against the claim of Casner or his estate, and that Stafford is not liable to said estate upon said claims on account of which set-off is asked by defendant.

"It is therefore ordered that said assignee pay a dividend of 25 per cent upon his claims, to the entering of which judgment defendant excepts. Court overruled exceptions and defendant appeals," etc.

All that is urged by appellant as grounds for reversal of the findings and order of the County Court is involved in the issue of fact raised and contested, and depends wholly upon the weight of the evidence for proper solution, except the errors assigned as to the admission of evidence and the refusal of the court to hold the *fourth* and *fifth* propositions of law submitted by appellants.

The question as to the admission of evidence and the refusal of the court to hold the fourth and fifth propositions of law submitted, relate to the same points in the record and may be considered together. There is evidence in the record tending to show that appellee and the insolvent on the 23d day of March, 1896, entered into a comprehensive oral agreement, and that on the 24th day of March, 1896, a memorandum concerning the subject-matter of such agreement was drawn up and signed by the parties, but that the memorandum did not embrace the entire agreement, and was so understood by the parties at the time. Upon the trial, over the objections of appellant, the court allowed certain witnesses produced by appellee to testify to the terms of the oral agreement, to which appellant excepted. They direct the court to the same question in their fourth proposition of law, which is as follows:

“4. The court holds that all parol agreements between Casner and Stafford in relation to matters in controversy were merged in written agreement of March 24, 1896, introduced in evidence.”

The rule excluding parol evidence does not apply when the original contract was verbal and entire, and a part only is reduced to writing. Greenleaf on Evidence, Vol. 1, Sec. 284; Ludeke v. Sutherland, 87 Ill. 481. We can not hold, as matter of law, upon the state of record in this case, that all parol agreements between the parties in relation to the matters in controversy were merged in the writing of March 24, 1896, in evidence, and are therefore of opinion that the court did not err in admitting the evidence complained of, nor in refusing to hold appellant's fourth proposition.

After the assignment appellee filed, in the Circuit Court of Macon County, his bill and amended bill in chancery against the insolvent and the assignee for specific performance of an undertaking, embraced in the contract out of which the controversy in this case springs, to convey to appellee certain real estate, and prosecuted such suit to final decree. Upon the hearing in the County Court, appellant offered in evidence said bill and amended bill, and the decree rendered thereon, and at the instance of appellee the court refused to admit the same in evidence. Appellant excepted and followed it up by presenting to the court their fifth proposition of law, as follows:

"5. The court holds that the suit in chancery, entitled 'Stafford v. Casner et al.,' set forth in defendant's answer, was in relation to agreement between Casner and Stafford, relied upon by petitioner in this cause, and bars the present action."

Appellant contends that the bill and amended bill are proper evidence as tending to show what appellee, upon prior occasion, regarded as the contract, and that by the decree, the whole subject-matter of the contract is *res judicata*. While theoretically the bill and amended bill are proper evidence, yet a careful inspection of them, as a whole, in the light of the issues and the scope and purpose of that proceeding, discloses to our minds that they are of no evidentiary value in support of appellant's side of the contested issue in this case, and therefore the refusal of the court to admit them in evidence is not material error, and in our opinion the whole subject-matter is not *res judicata*. It is admitted by appellant that the issues upon which this case must turn were not, in fact, litigated or determined in the chancery case, and we are unable to see any reason, under the issues in that case, why the issues in this case should have there been litigated or determined.

The bill of exceptions in this case does not purport to contain all the evidence, and therefore we can not enter into the question of the weight of the evidence, nor of the want of sufficient evidence, for the presumption is, in such

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state of record, that there was before the trial court, at the hearing, sufficient competent evidence to warrant the court in every ruling and finding that is dependent on evidence for its support.

We find no substantial error in this record of which appellant can justly complain, and as the case will be affirmed, we do not deem it our duty to discuss appellee's cross-errors.

The findings, order and judgment of the County Court are affirmed.

The People, etc., of Illinois, for the use of the County of Pike, v. Addison Cadwell et al.

1. **FORMER DECISIONS**—*Followed*.—The decision in *The People, etc., for the use of the County of Pike, v. Addison Cadwell et al.*, is followed in deciding this case.

Debt, on official bond. Appeal from the Circuit Court of Pike County; the Hon. THOMAS N. MEHAN, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 18, 1899.

J. D. HESS, EDWIN JOHNSTON and WM. MUMFORD, attorneys for appellant.

A. G. CRAWFORD, attorney for appellee.

OPINION PER CURIAM.

In every material point, and the record, the errors assigned and argued in this case are the same as in *The People, etc., for use of Pike County, v. Addison Cadwell et al.*, in which we have filed an opinion containing the reasons of the court for affirming the judgment in that case, and for the same reasons there expressed we affirm the judgment here. Judgment affirmed.

M. D. Watts v. C. E. Bolin.

1. **SURETIES—Death of Principal Maker of Joint Note.**—The statute (Hurd's R. S. 1899, page 1684), providing that when the principal maker of any note, bond, bill or other instrument in writing dies, the holder of such note, bond or bill, must present the same to the proper court for probate, does not apply to cases where the estate of such principal maker is insolvent and nothing can be realized from it in due course of administration.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Pike County; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

A. G. CRAWFORD, attorney for appellant.

W. L. COLEY and W. H. CROW, attorneys for appellee.

MR. PRESIDING JUSTICE WRIGHT delivered the opinion of the court.

Appellee, as surviving partner of C. E. Bolin & Co., sued appellant upon a promissory note before a justice of the peace, and the case having been removed by appeal to the Circuit Court, where a jury was waived, the trial by the court resulted in a finding and judgment against appellant for \$158.21, to reverse which appellant prosecutes this appeal, assigning various errors, consisting chiefly that the finding is against the evidence and that the court erred in its holdings as to the law in the decision of the case.

On August 20, 1899, Travis Watts and appellant executed and delivered to C. E. Bolin & Co. their promissory note for \$197.40, due one day after the date thereof, with interest, which was in renewal of balances due on two former notes, signed by the same parties and White, the latter having previously died. Shortly after this was given Travis Watts died, and C. E. Bolin was duly appointed administrator of his estate. There is some controversy in the evidence concerning the fact whether appellee agreed to procure the

signature of the widow of White to the note, but we think the evidence strongly preponderates against appellant upon this point. Another contention is that appellant was merely the surety for Travis Watts, and appellee knowing this relation of the parties, and having failed (which he did) to probate the claim against the estate of Travis Watts, as required by the statute in such cases, the appellant is released from the payment of the note to the extent the same might have been collected of the estate if presented in proper time.

The evidence, we think, sufficiently establishes the fact that appellant was surety merely upon the note, and that this fact was known, or which is the same in legal effect, ought to have been known to appellee, and if, by presenting the claim and having it proved and allowed against the estate of Travis Watts, all or any part of it could have been collected of such estate, it was clearly the obligation of appellee to have done so, and a failure in this respect would entitle the appellant to be released from payment of the note in whole, or to the extent that such collection might have been made.

It appears from the evidence that there was not sufficient personal property of the estate to pay the widow's award, and that the real estate, after estimating the homestead right and dower interest of the widow of Travis Watts, was incumbered by mortgages to an extent equal to or more than its value; and the administrator having made report to the County Court of his acts, and the condition of the estate, he was discharged without having paid any part of the claims proved against the estate. After this, upon the allegation of subsequently discovered assets, an administrator *de bonis non* was appointed, but it does not appear he received, or did anything as such administrator. Soon after appellee was discharged as administrator, Grimes, who in such business is alleged to have been a partner of appellee, for \$100 purchased all the claims, amounting to nearly \$500, that had been proved against the estate of Travis Watts, procured executions to be issued upon them,

and under the claim to the right to redeem the real estate purchased by the widow of Travis Watts at the sale under decree of the foreclosure of the mortgages before alluded to, induced the widow to pay those claims to him in full, whereby it is argued by appellant that such act of Grimes was in effect the act of appellee, and such as he was obliged to perform as administrator, and therefore inures to the benefit of the estate, and had appellee presented and proved the note in suit against such estate, it would thus have been paid. We think this position too remote from the real point in issue. The estate was clearly insolvent, and when this appeared appellee was excused from probating the claim, as nothing could be realized in due course of administration, and appellee, as such administrator, was properly discharged by the County Court. The payment by the widow to Grimes, of the claims that had been proved against the estate of her deceased husband, was but a voluntary act on her part, which appellee could in no event have reasonably anticipated, and hence, for such reason, was under no obligation to present his claim for allowance. The propositions of law held and refused by the trial court of which appellant complains are in harmony with our own views and this opinion, and no error occurred in the holdings thereon. The judgment of the Circuit Court will be affirmed. Judgment affirmed.

M. Rumley Co. v. H. Dollarhide.

1. **PROMISSORY NOTES**—*Indorsed "Without Recourse," Implied Warranty.*—The indorser of a promissory note does not relieve himself from all liability by inserting the words "without recourse" in the indorsement placed upon the note. He will be liable on the implied warranty that the note is an obligation for the amount expressed upon its face.

2. **SAME**—*Liability of Indorser When Note is Usurious.*—If the maker successfully interposes the defense of usury, and defeats the collection of the interest reserved in the note, the indorser will be liable to the indorsee or legal holder for the deficiency thereby occasioned.

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Attachment.—Appeal from the Circuit Court of Edgar County; the Hon. HENRY VAN SELLAR, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

W. H. CLINTON, attorney for appellant.

J. W. HOWELL and J. E. DYAS, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

In the spring of 1892 appellee, as the agent of appellant, sold to one John Hopkins a separator. The separator was shipped on the 3d of June of that year, and Hopkins executed to appellant in payment two notes aggregating \$430. The machine did not work satisfactorily, and appellee was so notified by Hopkins a number of times during the threshing season of 1892, all of which notices were sent by appellee to appellant. The notes remained in possession of appellee, who on the 27th of September, 1892, sent to appellant the sum of \$313.83, being the amount due on the notes, less appellee's commission, according to the terms of his agency contract with the appellant. Hopkins refused to pay the notes when due on the ground that the separator was worthless, and appellee, on February 14, 1894, forwarded them to appellant to procure its indorsement to him. Appellant assigned the notes to appellee "without recourse." In a suit upon them in the Circuit Court Hopkins defeated appellee on a plea of total failure of consideration, and the judgment there rendered was afterward affirmed on appeal to the Appellate Court.

To recover the amount paid by appellee to appellant for the notes, interest, costs and expenses of the litigation against Hopkins, this suit was commenced, and a judgment rendered in favor of appellee for \$500.

Appellant contends that it is not liable, because it assigned the notes after maturity and "without recourse," and because appellee had notice of Hopkins' defense. Numerous authorities are cited, some of which would be applicable in a suit by the indorsee against the maker, and others applicable in a suit against appellant as indorser on the contract

of indorsement. Appellee disclaims, however, his reliance upon appellant's contract of indorsement, and bases his right of action on the liability of appellant as a vendor of property which proved to be worthless.

There could be no question of the liability of appellant to Hopkins had Hopkins paid cash for the separator, and on its appearing after proper trial to be totally unfit for the service designed by it.

In this case the cash was advanced by appellee—appellant's selling agent. From him appellant received all it would have been entitled to had the separator been a satisfactory machine. It turned out to be utterly worthless, however, and a suit against the purchaser was unavailing for that reason. It would seem clear, then, that an action would lie for money had and received against appellant, for the money so advanced on the notes which proved to be worthless, by appellee.

The rights of the parties were not limited to the contract of indorsement "without recourse," entered upon the notes on the 14th of February, 1894, and appellant's attempt to escape liability by making such indorsement was fraudulent and should not succeed. The indorser of a promissory note does not relieve himself from all liability by inserting the words "without recourse" in the indorsement placed upon the note. He will be liable on the implied warranty that the note is an obligation for the amount expressed upon its face. If the note is usurious, for instance, and the maker successfully interposes the defense of usury and defeats the collection of the interest reserved in the note the indorser will be liable to the indorsee or legal holder for the deficiency thereby occasioned. *Drennan v. Bunn*, 124 Ill. 175.

Appellant had notice of the pendency of the suit against Hopkins and of the defense interposed, and, under the authority above cited, can not be regarded as a stranger to the suit. The judgment there rendered, it appearing that no fraud intervened in the procuring of it, concludes appellant.

When we consider all the circumstances surrounding the

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transaction we do not think appellee should be prejudiced in his right of action against appellant by the fact that he had been notified that the machine did not work satisfactorily. Such notice should not have the same force in this suit as in one against the maker of the note pleading failure of consideration.

The judgment is right, and should be affirmed.

Joseph Dehm and Mary Brinkman v. Elizabeth Dehm.

1. *GIFTS—Declarations of Deceased Showing Intention.*—The court holds that in this case the proven declarations of the deceased show an intention to make a gift of the money and note to his daughter, and his actions in having the money deposited in her name and in indorsing and delivering the note to her, make the gift complete.

BILL IN CHANCERY, to discover concealed effects. Appeal from the Circuit Court of Mason County; the Hon. JOHN C. BROADY, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 18, 1899.

I. R. BROWN, attorney for appellant.

H. R. NORTHRUP, attorney for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is a suit in chancery commenced by Joseph Dehm, executor of the will of Herman Utmiller, deceased, and Mary Brinkman, one of the daughters and devisees of Utmiller, to compel Elizabeth Dehm, another daughter and devisee of Utmiller, to discover and turn over to the executor some \$1,600 in money, and a promissory note for \$700, alleged to be assets of the estate.

Upon a hearing the Circuit Court found for the defendant and dismissed the bill for want of equity. To reverse the decree entered this appeal is prosecuted.

Appellee claims the note and the money as a gift from

her father. The evidence in the record shows that the deceased, for several years immediately prior to his death, made his home with appellee, at Havana, Illinois. He was then between eighty and ninety years of age. During that time he received from the sale of a farm a considerable sum of money, the \$1,600 in question being a part thereof. When the \$1,600 was collected he had the same deposited in the Havana National Bank in the name of appellee, and on different occasions afterward spoke of it and treated it as belonging to appellee. He advised her to loan it or otherwise invest it instead of allowing it to remain idle in the bank. It was, with his advice and consent, withdrawn from the bank and invested in a lot and a building constructed thereon. He seemed so anxious for that investment that he promised, if it should be made, to turn over the note in question to appellee to assist in paying for the lot and building, and that he afterward did.

The proven declarations of the deceased show an intention to make a gift of the money and the note (or the proceeds of it) to his daughter, and his actions in having the money deposited in her name, and in indorsing and delivering the note to her, made the gift complete.

The Circuit Court properly found the equities with the defendant, therefore, and the decree will be affirmed.

Murray Bros. v. Churchill & Co.

1. JUSTICE OF THE PEACE—*Jurisdiction Lost by Irregular Continuance.*—Where a justice of the peace continues a cause indefinitely he loses jurisdiction, and any judgment subsequently rendered by him in such case is void.

2. SAME—*Taking Causes Under Advisement Indefinitely.*—Where a justice of the peace takes a case under advisement indefinitely, any judgment rendered by him thereafter in the case is a nullity.

Motion to Quash an Execution.—Appeal from the Circuit Court of McLean County; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 13, 1899.

D. D. DONAHUE, attorney for appellants.

The motion to quash the execution issued out of the Circuit Court on a justice transcript was proper. *Cunningham v. Wright*, 27 Ill. App. 334; *Rowe v. Peckham*, 30 App. Div. (N. Y.) 173.

The justice of the peace lost jurisdiction when he continued the case indefinitely, and consequently the judgment was void. *Harrison v. Chipp*, 25 Ill. 575; *Crandall v. Bacon*, 20 Wis. 671; *Brown v. Kellogg*, 17 Wis. 490; *Iowa Union Tel. Co. v. Boylan*, 86 Iowa, 93; *Taylor v. Ringer*, 19 Pac. 147; *State v. Gast*, 70 Wis. 673; *Crichton v. Beebe*, 7 Ill. App. 272; *Hall v. Reber*, 36 Ill. 483; *Carpenter v. Scott*, 86 Iowa, 563; *Martin v. Fales*, 18 Me. 23; *McCarthy v. McPherson*, 11 Johns. 407; *Downer v. Hollister*, 14 N. H. 122; *Flint v. Gault*, 15 Hun, 213.

YOUNG & POTTER, attorney for appellees, contended that great particularity is not required in the docket entries of a justice of the peace. S. & C. R. S., Ch. 79, par. 160.

Where a record of an inferior court shows that jurisdiction of the parties and the subject-matter has once attached, it will be presumed that all subsequent proceedings were in conformity to law, unless the record affirmatively shows the contrary. *C., B. & Q. R. R. v. Chamberlain*, 84 Ill. 343; *Ellinger v. Caspary*, 76 Ill. App. 525; *Crichton v. Beebe*, 7 Ill. App. 276; *Kerr v. Bennett*, 109 Mich. 546; *Chesmore v. Barker*, 101 Iowa, 576.

And silence in respect to subsequent jurisdictional steps is not fatal. *Ellegaard v. Haukaas*, 75 N. W. Rep. (Minn.) 12.

MR. JUSTICE HARKER delivered the opinion of the court.

Appellees sued appellants before a justice of the peace of McLean county. A trial was had on the 11th of June, 1898. The justice did not render judgment on conclusion of the trial but took the case under advisement and continued the cause indefinitely. Ten days thereafter he entered in his docket a judgment against appellants for \$60.40 and costs, and applied a tender of \$41.15, which had been made before

the trial, in partial discharge of it. On the 5th of August following, an execution issued and was returned not satisfied.

Subsequently appellees filed a transcript in the office of the circuit clerk of the county and sued out an execution thereon. Thereupon appellants moved the Circuit Court to quash the execution upon the ground that no legal judgment had been rendered against them. The court overruled the motion, and from that order this appeal is prosecuted.

By continuing the cause indefinitely on the day of the trial the justice lost jurisdiction, and the judgment subsequently rendered by him was void. At the conclusion of a trial before him, a justice of the peace must either render judgment or continue the cause to some definite time when he shall render judgment. If he takes the case under advisement indefinitely a judgment subsequently rendered by him is a nullity. *Harrison v. Chipp*, 25 Ill. 575; *Hall v. Reber*, 36 Ill. 483; *Brown v. Kellogg*, 17 Wis. 490.

Calling to their aid the rule of law that where the record of an inferior court shows that jurisdiction of the parties has once attached, it will be presumed that all subsequent proceedings were in conformity to law, unless the record shows affirmatively the contrary, appellees contend that the presumption should be indulged that the justice, when he continued the cause on the 11th of June, continued it to some definite time. We do not see how that could be in the face of the record made by him. It reads:

"June 11, 1898, 3 p. m. Parties appeared. Defendants filed objections to deposition. Deposition was opened and read. Witness was examined. The court continued the cause to read exhibits in deposition and examine authorities."

The plain purport of the language is an indefinite continuance.

The Circuit Court should have sustained the motion. The judgment will be reversed and the cause remanded with directions to the court below to enter an order quashing the execution. Reversed and remanded.

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1. **FORCIBLE ENTRY AND DETAINER—Vendor and Vendee.**—Where a vendee obtains possession under a written or verbal contract to purchase lands or tenements, fails to comply with his agreement, and withholds possession thereof after demand in writing by the person entitled to such possession, the action of forcible entry and detainer will lie at suit of the vendor for such possession.

2. **SAME—Contracts Void by the Statute of Frauds.**—A verbal contract within the condemnation of the statute of frauds can not be enforced in any way, either directly or indirectly, and can not be made either the ground of a demand or of a defense.

3. **SAME—A Summary Remedy.**—The action of forcible entry and detainer, as given by the statute, is a summary remedy in derogation of the common law, and the conditions and requirements of the statute in conferring jurisdiction must clearly exist to enable a party to invoke its aid.

4. **STATUTE OF FRAUDS—Does Not Apply to the Case at Bar.**—Where the defendant in an action of forcible entry and detainer does not set up verbal contract to defeat the action, and the plaintiff relies upon the defendant's obtaining possession under such a contract of purchase, and his failure to comply with it, as the ground of his right to recover, and is, therefore, compelled to establish such failure as one of the material facts to entitle him to recover, the statute of frauds ought not to be applied.

Forcible Entry and Detainer.—Appeal from the County Court of Macoupin County; the Hon. D. E. KEEFE, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

BELL & BURTON, attorneys for appellant.

PEEBLES & PEEBLES, attorneys for appellee.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was on action of forcible detainer by O. D. Leach, the appellant, against John Ritzke, the appellee, commenced on March 20, 1899, before a justice of the peace in Macoupin county, to recover the possession of a farm in that county. There was a trial by jury before the justice, and a verdict and judgment rendered for Ritzke.

Leach appealed to the County Court of that county, where the case was again tried by jury, with the same result as before. Leach prosecutes an appeal to this court to reverse the last judgment, urging as grounds therefor that the verdict and judgment are against the evidence; the court improperly refused three of appellant's instructions; improperly modified another; and gave improper instructions.

The evidence shows that Ritzke obtained possession of the farm from Leach on March 6, 1898, under a contract to purchase the same at \$4,250, paying \$500 at the time, and agreeing to pay \$1,000 thereafter, when Leach was to make him a deed therefor, and he was then to give Leach a mortgage securing the remaining \$2,750 of the purchase price. On the trial, Leach and Ritzke were the only witnesses as to what the provisions of the contract of purchase were, and they both agreed to all of the provisions except one, which was as to *when* the \$1,000 was agreed to be paid, Leach swearing it was to be paid between December 25, 1898, and January 1, 1899, while Ritzke swore it was agreed to be paid between January 1, 1899, and the summer following. Leach also testified that there was a written memorandum, embodying the terms of the contract of purchase, signed by himself and Ritzke, and left in the possession of Ritzke when the contract was made; and that he gave Ritzke notice to produce it at the trial, but he failed to do so.

Ritzke testified that no memorandum of the contract of purchase was made out and signed by him and Leach and left with him; therefore he could not produce it, as requested by Leach.

The evidence further shows that Leach, on March 10, 1899, made a formal written demand upon Ritzke for the immediate possession of the farm, which Ritzke failed to give; and that Ritzke had not paid the \$1,000 of the purchase price of the farm. At the close of all the evidence, the plaintiff presented a written instruction to the court as follows, "The court instructs the jury to find the issues for

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the plaintiff," with the request that the court give the same, but the court refused it. An exception was taken, and that ruling of the court is assigned and urged as error, on the ground that if the testimony of Leach was believed, then he was entitled to recover under the express provisions of the fifth clause of Section 2 of our Forcible Entry and Detainer Act, which is as follows:

"When a vendee, having obtained possession under a written or verbal contract to purchase lands or tenements, and having failed to comply with his agreement, withholds possession thereof, after demand in writing by the person entitled to such possession."

And if the testimony of Ritzke was believed, then Leach was entitled to recover, because Ritzke was setting up a verbal contract within the condemnation of the statute of frauds, which he could not do under the rule "that a verbal contract within the condemnation of the statute of frauds can not be enforced in any way, either directly or indirectly, and can not be made either the ground of a demand or the ground of a defense." Citing *McGinnis v. Fernandes*, 126 Ill. 228, and *Wheeler v. Frankenthal & Bro.*, 78 Ill. 124.

That rule is a correct one, but, we think, ought not to be applied in the case at bar for the reason that the defendant, Ritzke, did not set up a verbal contract to defeat the plaintiff; but Leach relied upon Ritzke obtaining possession of the farm, under a contract of purchase, and his failure to comply with it, as the ground of his right to recover, and was therefore compelled to establish *such failure* as one of the material facts, to entitle him to recover in forcible detainer; for Ritzke was shown to be a vendee in possession under contract of purchase, and was entitled to retain the possession obtained under that contract, as against his vendor, in the summary action of forcible detainer, where the statute only gives the vendor the right to recover in that action, upon his showing a *failure* on the part of his vendee to comply with the terms of the agreement under which he obtained the possession.

The summary remedy the statute gives, and which the appellant here invokes, is "in derogation of the common

law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist" to enable a party to invoke its aid. (See *Fitzgerald v. Quinn*, 165 Ill. 354, and the cases there cited.)

Nor was the appellant, under the evidence, entitled to recover in forcible detainer under any other of the clauses of said section 2, because it conclusively appears that Ritzke obtained possession under a contract of purchase, and Leach must recover, if at all, by showing the failure of appellee to comply with his contract of purchase. *Fitzgerald v. Quinn*, 165 Ill. 354, *supra*, and *Haskins et al. v. Haskins*, 67 Ill. 446.

The appellee could defeat a recovery by the appellant if he could prove that the very contract of purchase under which he obtained possession, as claimed by appellant, gave him until the summer of 1899 to pay the \$1,000 of the purchase price of the farm; for if that was a fact, then he (Ritzke) had not *failed to comply with that contract* by not paying the \$1,000, when written demand for possession was made upon him, nor by not paying that amount before this suit was commenced.

If Leach has sued in ejectment, as was done in *McGinnis v. Fernandes*, 126 Ill. 228, then the title under which the parties held the farm would have been involved, and the rule therein announced and insisted upon being applied here, would have to be applied; or if the appellee was setting up some other contract than the one under which he obtained possession, and that other contract was within the condemnation of the statute of frauds, then that rule would also be applicable, as held under similar facts in the case of *Wheeler v. Frankenthal & Bro.*, 78 Ill. 124.

The court therefore properly refused to give the peremptory instruction as requested; for appellee had the right to have the material and disputed question of fact, as to whether or not he had failed to comply with his contract of purchase, which arose on the trial, submitted to the jury for their determination.

The rulings of the court on the other instructions com-

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plained of were holdings that the appellant, in order to recover, must prove, among other facts, that the appellee had failed to comply with his contract of purchase; all of which, in our opinion, were proper, for the reasons above given, and therefore in those rulings the court did not commit error.

Lastly, counsel for appellant insist that the verdict is contrary to the evidence, and for that reason the court erred in not setting it aside. We have carefully examined all the evidence, and after a full consideration thereof are compelled to say that we do not feel warranted in believing the jury and trial judge were mistaken in the conclusion they reached.

Finding, in this record, that the court committed no reversible error, we affirm the judgment. Judgment affirmed.

Jacksonville Ry. Co. v. Lafayette Lamb.

1. **STREET RAILWAYS—Duty of Motormen.**—Great care should be exercised by motormen operating electric cars along the thoroughfares of a city, especially at street crossings, where danger of collision with vehicles is enhanced by corner buildings partially obstructing the view.

Action for Personal Injuries.—Appeal from the Circuit Court of Morgan County; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

EDWARD P. KIRBY, attorney for appellant.

J. O. PRIEST and GEORGE L. MERRILL, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment of \$220, recovered by appellee for damages sustained by him in the collision of one of appellant's cars with appellee's horse and buggy,

while he was driving across appellant's railway track in the city of Jacksonville.

Appellant is a corporation operating a street railway by electric power in the city of Jacksonville. It has a track running east and west on East State street, at a point of that street where it is intersected by a street from the south, called Clay avenue. On the 2d of November, 1896, appellee, an old man, was driving north in a top buggy on Clay avenue. It was raining and the roads were muddy and slippery. The railroad tracks were also slippery. Appellee was driving in a slow trot. While crossing the track he was struck by a car with such force that his buggy was carried or pushed along the track some twenty feet. His horse was crippled; his buggy was partially demolished, and he sustained serious injury to his person.

Appellant insists that appellee drove upon the railroad track carelessly and without proper regard for his own safety, and that the motorman operating the car was guilty of no negligence at the time of the collision. Appellee testified that just before he reached the track he looked out for a car but saw none; that he heard no bell ringing and that the first knowledge he had of a car being near him, was when it struck his horse and buggy. The motorman testified that he saw appellee's horse and buggy when fifty feet away; that he first endeavored to stop his car, but could not do so owing to the slippery condition of the track; that he thought as he approached nearer to appellee that the latter would stop or turn east, whereupon he increased the speed of the car by throwing on more power. The motorman miscalculated the intention of appellee to stop, and, as we see it from the evidence, the collision was due to that fact.

Great care should be exercised by motormen operating electric cars along the thoroughfares of a city, especially at street crossings, where danger of collisions with vehicles is enhanced by corner buildings partially obstructing the view. Buggies and wagons have an equal right with electric cars to the street. The introduction of electric cars as

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a mode of conveyance upon the streets of our cities has, by reason of the great speed with which the cars are operated, greatly augmented the dangers to the public in its use of the streets.

It was not error to give to the jury the first instruction asked by appellee. It is evident that the car was moving at a rapid rate of speed when it collided with appellee, else it would not have carried his buggy the distance it did before it could be stopped.

Instead of regarding the damages as excessive, we look upon them as very moderate. There is no sufficient reason for reversing the judgment. Judgment affirmed.

**Robert A. Sturgeon, J. F. Hinton and J. C. Wheeler v.
Valentine B. Birkey.**

1. **RECOVERY**—*In Assumpsit for Money Fraudulently Received.*—A recovery may be had in an action of assumpsit for money had and received, which the defendant has received by fraud, and which in equity and good conscience he should return to the plaintiff.

Assumpsit, for money had and received. Appeal from the Circuit Court of Champaign County; the Hon. FRANCIS M. WRIGHT, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

WHITE & DOBBINS, attorneys for appellants Hinton and Wheeler.

H. L. KELLY, attorney for appellant Robert A. Sturgeon.

JOHN J. REA and J. L. RAY & RILEY, attorneys for appellee.

A recovery may be had in an action of assumpsit under the common counts for money had and received whenever the defendant has money which in equity and good conscience he ought not to retain, and which in right and jus-

tice he should return to the plaintiff. *Fosselman v. City of Springfield*, 139 Ill. 185; *Laflin v. Howe*, 112 Ill. 253; *Barnes v. Johnson*, 84 Ill. 95; *Allen v. Stenger*, 74 Ill. 119; *Sandoval C. & M. Co. v. Main*, 23 Ill. App. 395; *Gallagher v. Frorer*, 4 Ill. App. 330.

MR. JUSTICE HARKER delivered the opinion of the court.

This is an appeal from a judgment recovered by appellee against appellants for money paid on a promissory note for \$250, executed by him to appellant Sturgeon and indorsed by Sturgeon and the other two appellants to an innocent purchaser before maturity. The suit was based upon the contention that execution of the note was obtained upon the false representations of appellants that the \$250 was to be used in paying one J. H. Somers to surrender a leasehold upon a farm which appellee had purchased of one S. R. Reed, when, in fact, no money was necessary to be paid Somers by appellee to secure a surrender of his lease.

There does not appear in the record before us any just ground for the alleged errors of the court in ruling upon evidence or in passing upon instructions. We shall, therefore, in this opinion, only discuss the contention of appellants that the verdict is against the law and the evidence. The evidence shows that appellee, during the spring of 1897, was induced by appellants to purchase 160 acres of land in Champaign county, which S. R. Reed, a resident of Piatt County, had placed in the hands of Hinton and Wheeler to sell. J. H. Somers was living upon the land at the time and had an unexpired term of three years of a lease. After a purchase price had been agreed upon, it was represented to appellee that \$500 would be required to obtain possession of the land from Somers, and that it would take \$250 from appellee. Under the representation that that sum would be paid to Somers on his behalf, appellee was induced to execute the note in question to Sturgeon, who, with the other appellants, indorsed it to an innocent purchaser, and it was subsequently paid by appellee. Appellants concealed from Reed and Somers the fact that they had taken the note from

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appellee. As a matter of fact, Reed himself paid Somers for the surrender of his lease, and neither of them knew anything about the note until it was paid, nearly a year after the purchase of the land.

That gross fraud and imposition was practiced upon appellee is clear to our minds. That appellants are liable to him for their tortious act is equally clear to us. An attempt is made to shift the responsibility, but it should not succeed. They were all in the scheme to defraud this ignorant German farmer, and are jointly liable. While he could have maintained his action of case, he had a right to waive the tort and sue in assumpsit. It is firmly established that a recovery may be had in an action of assumpsit for money had and received which the defendant has obtained by fraud, and which he in equity and good conscience should return to the plaintiff. It is not essential for it to appear what each one received as his part of the fruits of the fraud; nor can appellants escape liability by showing that after Reed had uncovered the fraud they paid the proceeds of the note, or a part of them, to him. The money they received on the sale of the note in equity and good conscience belonged to appellee and should have been paid to him and not to Reed.

We think the evidence supports the verdict and the judgment should be affirmed.

Mr. Presiding Justice WRIGHT, having presided at the trial in the court below, took no part in the decision of this case.

City of Bloomington v. L. K. Calhoun et al.

1. *DEBT—Plea in Actions upon Collector's Bonds.*—A plea to an action upon the official bond of a tax collector, stating that the principal defendant was duly elected to the office of township collector of taxes and duly qualified for such office according to law; that afterward the city of Bloomington pretended to appoint him collector of the general taxes for that part of the city of Bloomington lying in Bloomington township, and to fix his salary or fees on that fund at one per cent of the amount he should collect; that afterward, by virtue of his said office

of township collector of taxes, and under a warrant under the hand and seal of the county clerk, he collected certain general taxes specified in said warrant; that among these taxes so collected was the sum of \$86,599.82, part of the sum directed in said warrant to be collected and turned over to the city of Bloomington; that the balance of the sum so directed in the said warrant to be collected and turned over to the said city he was unable to collect, but duly accounted for the same as by law directed; that out of the sum so collected belonging to the city fund he retained the lawful commissions of the office of township collector, to wit, two per cent, amounting to \$1,331.99; that the balance, namely, \$86,267.63, he duly turned over to the said city of Bloomington on or before April 22, 1898, whereupon, his liability to the said plaintiff, the city of Bloomington, wholly ceased, *absque hoc*, etc., sets up a good defense to the declaration.

2. CITIES—*Can Not Fix the Fees of Township Collectors.*—The city of Bloomington can not, by ordinance or otherwise, deprive the town collector from retaining his full commission from the city taxes collected by him as town collector.

3. PRACTICE—*Entering Judgment on Demurrer.*—Where the facts set up in a plea constitute a complete defense to the entire claim made in the declaration, and are confessed by demurrer, the court may properly enter judgment for the defendants.

Debt, on an official bond. Appeal from the Circuit Court of McLean County; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

WM. R. BACH, attorney for appellant; SIGMUND LIVINGSTON, of counsel.

HART & HOFFMAN, attorneys for appellees; CALVIN RAYBURN, of counsel.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of debt by the appellant against the appellees, tried in the Circuit Court of McLean County upon a bond, of which the following is a copy :

“ Know all men by these presents—That we, L. K. Calhoun as principal, and Peter Whitmer, Hamet N. Senseny, George F. Dick, C. J. Northrup, W. S. Rodman, J. Kennan and Lincoln H. Weldon as sureties, all of the county of McLean and State of Illinois, are held and firmly bound unto the city of Bloomington, in the State of Illinois, in the

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penal sum of one hundred eighty-eight thousand five hundred forty-four dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, firmly by these presents.

Signed with our hands and sealed with our seals, and dated this 30th day of December, A. D. 1897.

The condition of the above obligation is such that, whereas, on the third day of May, A. D. 1897, the above bound L. K. Calhoun was appointed by the city council of said city collector of taxes for that part of the city of Bloomington lying in Bloomington township. Now, if the said L. K. Calhoun shall well and truly perform, all and singular, the duties required of him by the laws of Illinois and ordinances of said city, as collector aforesaid, and shall justly and truly account for and pay over all moneys which may come into his hands, under any process or otherwise, by virtue of his said office, and shall promptly and faithfully discharge all the duties of his said office, then the above obligation to be void, otherwise to remain in full force and virtue.

L. K. CALHOUN.	[SEAL.]
PETER WHITMER.	[SEAL.]
HAMET N. SENSENY.	[SEAL.]
GEORGE F. DICK.	[SEAL.]
C. J. NORTHRUP.	[SEAL.]
W. S. RODMAN.	[SEAL.]
J. KENNAN.	[SEAL.]
LINCOLN H. WELDON.	[SEAL.]”

The original declaration averred that on December 30, 1897, appellee Calhoun took and subscribed the prescribed oath of office as collector of taxes for that part of the city of Bloomington lying in Bloomington township, in the county of McLean and State of Illinois, and on December 31, 1897, filed with the city clerk of said city said bond and oath of office, and the bond was approved on that day by the city council of the city of Bloomington; and that thereupon appellee Calhoun took upon himself the performance of the duties of that office. The declaration further avers that he has not faithfully discharged the duties of said office as required of him by law; and assigns as a breach of the condition of the bond that appellee Calhoun collected \$66,599.82 of the taxes belonging to the city of

Bloomington and failed to pay over to said city all of the same, unjustly detaining from the city, over and above his salary as such collector, the sum of \$655.99 thereof, which amount justly belongs to the city and has been demanded of him by its proper officers, but has not been paid.

To the declaration the defendants interposed pleas as follows: (1) a plea of *non est factum*; (2) plea of *nil debet*; (3) plea of general performance; (4) plea setting up that L. K. Calhoun was duly elected collector of taxes for the township of Bloomington on April 1, 1897, and on November 1st he duly qualified as such collector and gave the bond required by statute; that afterward, upon request of appellant, he gave the supposed bond sued on in this case, without receiving from appellant any additional rights or privileges over and above what was already his by virtue of his election and qualification as township collector, and without there being any consideration for the giving of the supposed bond; (5) and (6) pleas embodying all the matters in the four other pleas.

Afterward an additional account was filed to the declaration, in which it was further averred that on May 14, 1897, the city council of Bloomington duly passed an ordinance entitled "An ordinance fixing salaries of officers and employes of the city of Bloomington for the fiscal year ending April 30, 1898," by which ordinance the compensation of the city collector for that part of the city of Bloomington lying in Bloomington township was fixed at one per cent of the amount collected by him, which ordinance was approved by the mayor of said city on May 15, 1898, and that the amount of taxes collected and unpaid by appellee, as such city collector, was \$1,331.98.

The defendants interposed to the original and amended declarations what is called in this record their *first* and *second additional pleas*.

"The first additional plea avers that defendant ought not to be charged with the debt by virtue of said writing obligatory, because the defendant was not appointed city collector of taxes, and because he never qualified as said city collector of taxes, and because he never collected

\$66,599.82, or any other sum as city collector of taxes, or under any authority derived from the plaintiff, the city of Bloomington, and he does not detain \$655.99 nor \$1,331.98, nor any other sum of money which belongs to the city of Bloomington."

The second additional plea is as follows :

"And for further plea in this behalf the defendants say that they ought not to be charged with the said debt, by virtue of the said writing obligatory, because they say that, on, to wit, the first Tuesday in April, 1897, the defendant, L. K. Calhoun, was duly elected to the office of township collector of taxes and duly qualified for such office according to law; that afterward the city of Bloomington pretended to appoint him, the said L. K. Calhoun, collector of the general taxes for that part of the city of Bloomington lying in Bloomington township, and to fix his salary or fees on that fund at one per cent of the amount he should collect.

That afterward, by virtue of his said office of township collector of taxes, and under a warrant under the hand and seal of the county clerk, he collected certain general taxes specified in said warrant; that among these taxes so collected was the sum of \$66,599.82, part of the sum directed in said warrant to be collected and turned over to the city of Bloomington. The balance of the sum so directed in the said warrant to be collected and turned over to the said city he was unable to collect, but duly accounted for the same, as by law directed; that out of the sum so collected belonging to the city fund he retained the lawful commissions of the office of township collector, to wit, two per cent, amounting to \$1,331.99; that the balance, namely, \$66,267.63, he duly turned over to the said city of Bloomington on or before April 22, 1898; whereupon his liability to the said plaintiff, the city of Bloomington, wholly ceased, without this, that on, etc., the defendant, L. K. Calhoun, was appointed by the city of Bloomington city collector of taxes and collected the taxes mentioned in the plaintiff's declaration and unlawfully retains the sum of \$665.99, or \$1,331.98, which in right and equity belong to the city of Bloomington, as the plaintiff in this declaration has alleged; and this the defendants are ready to verify; wherefore they pray judgment if they ought to be charged with the said debt by virtue of the said writing obligatory."

The appellant filed a similiter to first plea, a replication

to the fourth, and demurred to the second, third, fifth, sixth, and the first and second additional pleas. The court sustained the demurrer to the second, third, fifth and sixth pleas, and overruled it to the first and second additional pleas. The appellees, by leave of court, withdrew their first additional plea, and appellant stood by its demurrer to the second additional plea, and the court gave judgment for appellees, in bar of the action.

The appellant urges us to reverse that judgment on the grounds (1) that the court improperly held the second additional plea good, when in law it set up no defense to the declaration; and (2) the court improperly gave final judgment for the appellees when there were other issues pending and undetermined.

The second amended plea, in effect, sets up that Calhoun was duly elected, gave bond and qualified as collector of taxes for the town of Bloomington, in McLean county, Illinois, and as such town collector he received from the county clerk of that county the warrant prescribed by law, commanding him as such town collector, to collect the taxes mentioned in the declaration; that he collected said taxes as such town collector, and under the command of that warrant he turned over and accounted to the appellant for all of said taxes so collected, except two per cent thereof, which he retained as his fees for collecting the same, as he lawfully might; and that he did not collect said taxes as city collector, and did not unlawfully retain the sum of \$665.99 or of \$1,331.99, as alleged by appellant in its declaration.

The appellant, by its demurrer, admits the facts set up in this plea to be true.

By the provisions of Section 122 of Chapter 120, Starr & Curtis' Ill. Statutes (1896), the proper authorities of the cities in this State shall annually certify to the county clerks the several amounts which they severally require to be raised by taxation; by section 123 of same chapter, the county clerk shall annually make out in books, for the use of collectors, correct lists of taxable property, as assessed and

equalized; by section 124, same chapter, in counties under township organization; said books shall be made to correspond with the organized townships; by section 125, same chapter, it is provided how the county clerks shall prepare the collectors' books and that they shall contain proper columns for the extension of the several kind of taxes; by section 127, same chapter, the county clerks shall estimate and determine the rate per cent upon the proper valuation of property in the respective towns, townships, districts and incorporated cities, towns and villages in their counties, that will produce within the proper divisions the net amount of the sums that shall be required or certified to them according to law; by section 128, same chapter, the city taxes shall be extended against the assessed and equalized valuation of property within their respective jurisdictions; by section 132, same chapter, to each collector's book a warrant under the hand and official seal of the county clerk shall be annexed, commanding the collector to collect, from the several persons named in said book, the amounts opposite their respective names, and the warrant shall direct the collector to pay over the several kinds of taxes collected by him to the respective officers entitled thereto, less the compensation for collection allowed by law; by section 36, chapter 53, *Ib.*, each town collector shall be allowed a commission of two per cent on all moneys collected by him, to be paid out of the respective funds collected, with the proviso that all excess of commissions and fees over \$1,500 shall be paid into the town treasury; by paragraph 61, chapter 139, *Ib.*, at the annual town meeting in each town, there shall be elected by ballot, one collector, who shall hold office for one year; by paragraph 88, same chapter, the town collector is required to give bond prescribed by law before he enters upon the duties of his office; by section 133, chapter 190, *Ib.*, the form and amount of a town collector's bond is prescribed; by section 138, chapter 120, *Ib.*, it is made the duty of the county clerks to deliver to the collectors the books for collection of taxes; by sections 136 and 138 of chapter 120, *Ib.*, to each town collector's book is required to be annexed, by the

county clerk, a warrant under his hand and seal, commanding such collector to collect from the several persons named in said town collector's book, the several sums of taxes therein charged opposite their respective names, and directing the town collector, after deducting the compensation to which he may be legally entitled, to pay over * * * to the city treasurer * * * the taxes or special assessments collected by him for such city; by section 155, chapter 120, Ib., every town collector, upon receiving the tax book or books, shall proceed to collect the taxes therein mentioned; by section 163, chapter 120, Ib., whenever any person shall pay the taxes charged on any property, the collector shall enter such payment in his book, and give a receipt therefor, and enter the name of the owner or person paying tax opposite each tract or lot of land, and when he collected the tax thereon; by section 164, chapter 120, Ib., the town collector shall every thirty days, when required so to do by the proper authorities of cities for which any tax is collected, render to said authorities a statement of the amount of each kind of taxes collected for the same, and at the same time pay over to such authorities the amount so shown to have been collected; by section 157, chapter 120, Ib., each town collector shall make final settlement for the city taxes charged in the tax books, at or before the time fixed in this act for paying over and making final settlement for State and county taxes collected by him (by section 169, chapter 120, Ib., the time fixed is March 10th), and in such settlements, the town collectors shall be entitled to credit for the amount of their commissions on the amount collected; by section 174, chapter 120, Ib., if the town collector shall fail to make final settlement, or pay over the amount in his hands, when required in this act, the county collector shall forthwith cause the bond of such town collector to be put in suit, and to recover the sum due for all taxes and special assessments due, and twenty-five per cent damages, with costs of suit; and by section 175, chapter 120, Ib., upon final settlement by any town collector of the amount of taxes directed to be collected by him, in any of the towns of this State, the

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county collector shall, if requested, give to such town collector or any of his securities, a satisfaction piece in writing.

In construing section 36, chapter 53, *supra*, our Supreme Court, in *Ryan et al. v. The People*, for the use of the town of West Chicago, 117 Ill. 486, held that the excess of commissions and fees over \$1,500 allowed to town and district collectors, by the proviso of that section, must be paid into the town treasury, and that so much of such excess as arises from the two per cent allowed such collector, for collecting city taxes on property in city limits within his township, does not belong to such city, but to the town; and that by the various provisions of our general revenue act (being chapter 120, *supra*), in a county under township organization, "all taxes are required to be collected by the town collector."

From the various provisions of our statutes governing the assessment and collection of city taxes, some of which are above referred to, and the questions decided in *Ryan et al. v. The People*, etc., *supra*, we are compelled to conclude that the facts set up in the second amended plea above quoted are a good defense to the declaration, because appellee Calhoun as collector of the town of Bloomington, had the right, and it was his duty, to collect the city taxes levied upon property in the part of the city of Bloomington within that town; and in obedience to the express command of the warrant issued to him as such town collector, by the county clerk of McLean county, it was his duty to pay the same, less his commissions of two per cent thereon, to the city of Bloomington, all of which, in this plea, he says he did.

Besides the appellee Calhoun by paying to the city of Bloomington all its city taxes which he collected as such town collector, in the town of Bloomington, except his commission of two per cent for collecting same, which the statute allows him, and a part or all of which, for all that appears in this record, he may have to pay to the town of Bloomington, thereby obeyed the express commands of the warrant under which he collected them, and in so doing he

is protected by it from any further liability to the city for any part thereof.

Counsel for the appellant insist, however, that by the terms and recitals of the bond sued on, and the provisions of section 36 of chapter 53, *supra*, and the ordinance of the city of Bloomington set up in the additional count of the declaration, the appellees are liable on the bond sued on for all the city taxes that he collected except one per cent thereof, which is all that said city ordinance allows, notwithstanding the provisions of the statute and the decision in the Ryan case, *supra*.

But we think that the city of Bloomington could not, by ordinance or otherwise, deprive the appellee Calhoun, as town collector, from retaining his full two per cent commissions from the city taxes collected by him as town collector, nor are there any recitals or provisions in the bond that estopped or otherwise precluded the appellees from pleading as a defense thereto that Calhoun did not collect the taxes mentioned in the declaration as city collector, and averring that he did collect the same as town collector, and had paid to said city all of the same, except his lawful commissions thereon as town collector; for the bond sued on does not recite that Calhoun was appointed city collector by the city council of the city of Bloomington, but merely recites his appointment as collector, and by the provisions of paragraph 113, Chap. 24, Starr & Curtis' Ill. Stat. 1896, 736, city taxes must be collected by the same officers as State and county taxes; and the ordinance set up in the amended count of the declaration, by which the commission allowed by it to the collector was to be limited to one per cent on the amount collected by him, was approved by the mayor of said city, May 15, 1898, which was long after the bond sued on was executed and approved, as appears by the averments in the declaration.

Had the appellees denied, by the second amended plea, that L. K. Calhoun was appointed by the city council of the city of Bloomington collector of taxes for that part of the city of Bloomington lying in Bloomington township, they would have been estopped by the recitals in the bond from

pleading that he was not so appointed, because by the averments of the declaration it is stated that the bond sued on was signed by the appellees, and that it recites such appointment, and the law is, that such recitals are binding upon those signing the bond, and estop them from denying same.

The vital facts set up in the second amended plea, and which we hold show a complete bar to the whole declaration, are, that appellee Calhoun was town collector, and received the amount of taxes mentioned in the declaration as such town collector; that he paid to the city of Bloomington (appellant) all of said taxes except his lawful commissions as such town collector; and that he did not receive said taxes as city collector.

The other contention of counsel for the appellant, that the Circuit Court improperly entered final judgment when there were other issues of fact pending and undetermined, we think, ought not to prevail, because the second amended plea answers the cause of action set out by both the original and amended declaration, both charging a breach of the bond set out in each count, and by a copy attached to each and made a part thereof respectively, which shows but one and the same bond; the breach of that bond in both counts being the same, namely, a failure and refusal of Calhoun, the principal named in the bond, to pay over all the moneys collected by him as city collector for city taxes paid to him by persons owning property within that part of said city lying in Bloomington township.

The facts set up in the second amended plea being confessed by the demurrer, and they showing a complete defense to the entire claim made in the declaration, the Circuit Court properly entered judgment for the defendants (appellants) in bar of the action, under the rule that if a defendant succeeds upon one plea, which is a complete answer to the declaration, he shall have judgment in his favor in bar of the action, although there may be other issues of fact undisposed of. *Bissell et al. v. Kankakee*, 64 Ill. 249; and *Moffet v. Brown*, 16 Ill. 91.

Finding no reversible error was committed by the Circuit Court, we affirm the judgment. Judgment affirmed.

86	509
186	606

County of Edgar v. John Middleton.

1. **SHERIFFS—Appointment of Janitors.**—The care and custody of the county court house and jail come within the common law powers and duties of the sheriff, and the employment of a necessary janitor to assist him is a right incident to his office.

Assumpsit, for services. Trial in the Circuit Court of Edgar County, on appeal from the board of supervisors; the Hon. FRANK K. DUNN, Judge, presiding. Verdict and judgment for plaintiff; appeal by defendant. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

Statement.—On the 2d day of December, 1896, the board of supervisors of Edgar county adopted a resolution employing appellee as janitor for the court house for one year, at a salary of \$50 per month.

December 1, 1897, the board by resolution again employed appellee to perform the same services, same consideration to be paid and the term of employment to be for one year. The evidence shows that appellee at some time after the first resolution assumed and performed the duties required of him as janitor for the court house until May 1, 1898, by virtue of his employment under these resolutions. In the latter part of April, 1898, at a special term of the board of supervisors a resolution was adopted discharging appellee, and rescinding the resolution by which he had been employed. By this resolution three members of the board were named as the committee on public buildings and were instructed to employ a janitor for the court house.

After the adoption of the last resolution two of the three members of the committee on public buildings went to appellee and informed him of the action of the board, telling him he had been discharged by a resolution adopted by the board, and that his term of employment as janitor would expire May 1, 1898. The committee informed him they had employed another janitor and requested him to turn his keys and everything over to his successor.

Appellee said he would turn the keys over to the sheriff during the April meeting, 1898. Appellee knew he was going to be discharged. After he had been notified by the committee to quit and turn over his keys, the sheriff told appellee he had the right to, and would employ him as janitor at \$50 per month; for him to go ahead as he had been. Appellee, relying entirely upon his employment by the sheriff, continued to perform the duties of janitor until December 5, 1898. The board refused to pay him for services rendered after May 1, 1898, the date of his discharge by the board. Appellee presented a claim against the county for \$100 for his services as janitor for the months of May and June, 1898. The claim was not allowed and appellee took his claim by appeal to the Circuit Court. At the meeting of the board in September, 1898, appellee presented a bill against the county for \$100 for his services as engineer, for the months of July and August, 1898. This claim was not allowed, and like the others, was taken by appeal to the Circuit Court. These claims against the county both came up for trial at the November term, 1898, of the Edgar Circuit Court, and by agreement of the parties were tried as one case, the evidence being the same in each case. The cases were tried by the court, a jury being waived. The court gave judgment for the plaintiff for the sum of \$100 in each case.

H. S. TANNER, attorney for appellant.

J. W. HOWELL, F. W. DUNDAS and J. E. DYAS, attorneys for appellee.

MR. JUSTICE HARKER delivered the opinion of the court.

The services for which appellee's claim was filed, were performed under an employment by the sheriff of the county. No question is raised as to the contract of employment being reasonable, and the only one discussed is whether the authority to employ a janitor for the court house rests with the sheriff or the board of supervisors. In behalf of appellant it is contended that the authority rests exclu-

sively with the board, and such contention is based upon the third paragraph of section 24, and the first and second paragraphs of Section 25 of Chapter 34 of the Revised Statutes, Hurd's Revision of 1898. The first paragraph mentioned provides that a county, in the exercise of its corporate authority, shall have power "To make all contracts and do all other acts in relation to the property and concerns of the county, necessary to the exercise of its corporate powers." The other paragraphs mentioned provide that the county boards of the several counties shall have power, "First, to take and have the care and custody of all the real and personal estate owned by the county." "Second, to manage the county funds and county business, except as otherwise specifically provided."

The question was considered by this court in the case of County of McDonough v. Thomas, 84 Ill. App. 408, and there decided adversely to the contention of appellant. In that case we held that the care and custody of the county court house and jail come within the common law powers and duties of the sheriff, and that the employment of a necessary janitor to assist him was a right incident to his office. We held that instead of the above quoted paragraphs taking from the sheriff that common law power, a legislative intent to the contrary was manifested by section 14 of chapter 125, entitled "Sheriffs," which provides that he shall have the custody and care of the court house and jail of the county; and section 24 of the same chapter, which provides that he shall, on going out of office, deliver possession of the court house and jail to his successor. We thought then, and think now, that our decision of the question is in harmony with the views of our Supreme Court, as expressed in the opinion of Mr. Justice Magruder in Dahnke v. The People, 168 Ill. 102.

The judgment will therefore be affirmed.

The County of Edgar v. Granville A. Sanders.

1. **FORMER DECISIONS**—*Followed*.—The County of Edgar v. John Middleton (*ante*) governs this case.

Assumpsit, for services rendered. Appeal from the Circuit Court of Edgar County; the Hon. FRANK K. DUNN, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 18, 1899.

H. S. TANNER, attorney for appellant.

J. W. HOWELL, F. W. DUNDAS and J. E. DYAS, attorneys for appellee.

OPINION PER CURIAM.

The facts in this case are identical with those in the case of County of Edgar v. Middleton, decided at this term, except that appellee in this case was employed as an engineer to run the heating plant for the court house and jail and to keep the court house lawn in order.

The judgment will be affirmed, for the reasons expressed in the opinion filed in that case. Judgment affirmed.

Henry C. Littlejohn v. Daniel H. Arbogast.

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1. **COURTS**—*Entering Judgment Nunc Pro Tunc After the Term*.—A court has no power to enter a judgment *nunc pro tunc* as of a previous term, unless a judgment was in fact rendered at the previous term, and some minute or memorial paper thereof appears in the record itself.

2. **PRESUMPTIONS**—*In Favor of Verdicts*.—Every presumption is in favor of the verdict of the jury, and until it is set aside by the court it is proper to give judgment upon it.

3. **APPELLATE COURT PRACTICE**—*Where There Has Been a Failure to Enter a Proper Judgment*.—Where there has been a failure on the part of the court to enter a proper judgment upon a verdict the Appellate Court may, upon motion, remand the cause to the Circuit Court, with leave to the plaintiff to move that court for a proper judgment on the verdict.

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Littlejohn v. Arbogast.

Error to the Circuit Court of De Witt County; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded, with directions. Opinion filed December 20, 1899.

HERRICK & HERRICK and MOORE, WARNER & LEMON, attorneys for plaintiff in error.

There must be a memorial paper or minute by which the record may be amended, and it must be made and preserved as a part of the record pursuant to law. *Dougherty v. People*, 118 Ill. 164; *Tynan v. Weinhard*, 153 Ill. 598; 1 *Bacon's Abridgment*, title, Amendment, F; *Cook Co. v. Dock Co.* 131 Ill. 510.

The judgments and records of courts can not rest in parol or upon so uncertain a foundation as the personal recollection of the judge or any other person, and the fact that a judgment was rendered at the former term can not be determined from the memory of witnesses or the personal recollection of the judge himself. Where there is no minute or memorial paper in the records of the court to show that judgment was in fact pronounced, it can not be so entered. *Tynan v. Weinhard*, 153 Ill. 598; *Dougherty v. People*, 118 Ill. 164; *Ayer et al. v. City of Chicago*, 149 Ill. 262; *Coughran v. Gutchens*, 18 Ill. 390; *Frew v. Danforth*, 126 Ill. 242.

The weight of authority sustains the rule that only by some entry or memorandum on or among the records of the court can the rendition of a judgment be proved. An entry must somewhere be found and produced in court, apparently made by the authority of the court. It must be in some book or record required to be kept by law in that court. *Freeman on Judgments*, Section 62; *Dickins v. Bush*, 23 Ala. 849; *Metcalf v. Metcalf*, 54 Am. Dec. 190.

At a subsequent term the court can only allow amendments in mere matters of form, or to correct clerical errors after notice has been given to the opposite party. *Coursen v. Hixon*, 78 Ill. 339; *Insurance Co. v. Chamber of Commerce*, 69 Ill. 22; *Baker v. Palmer*, 83 Ill. 568; *McKindley v. Buck*, 43 Ill. 488; *Saving Institution v. Nelson*, 49 Ill. 171.

WELTY & STERLING and GEORGE K. INGHAM, attorneys for defendant in error, respectfully ask, under the authority, as was done in the case of C., B. & Q. R. R. Co. v. Wingler, 165 Ill. 634, that in case your honors reverse the said judgment, that the same be remanded to the Circuit Court, with leave to defendant in error to move for a proper judgment on the verdict.

OPINION PER CURIAM.

At the December term, 1897, of the Circuit Court of De Witt County, a verdict for \$2,000 damages was returned against the plaintiff in error, and at the same term his motions for a new trial and in arrest of judgment were overruled by the court, and no other order or final judgment was afterward entered at that term, except the order for an appeal, nor was there any minute or memorial paper of such order or judgment. At the March term, 1898, on motion of the defendant in error the court ordered a judgment for \$2,000 upon the verdict, to be entered *nunc pro tunc* as of the former term, to reverse which this writ of error is prosecuted.

The authority of the court to enter such judgment *nunc pro tunc* is challenged, because no judgment was in fact rendered or ordered at such term, nor was there any minute or memorial of such judgment, and the records of the court could not rest in the recollection of the witnesses or the memory of the judge alone. Counsel for defendant in error in their brief in effect confess this error, and request us to remand the cause to the trial court with leave to move that court for a proper judgment under the authority of C., B. & Q. R. R. Co. v. Wingler, 165 Ill. 634, where it was held that a court has no power to enter a judgment *nunc pro tunc* as of a previous term unless a judgment was in fact rendered at the previous term, and some minute or memorial paper thereof appear in the record itself.

To the request for such leave counsel for plaintiff in error object in their reply, contending that nothing remains in the record upon which a judgment could properly be entered

at any time. The general rule is that every presumption is in favor of the verdict of the jury, and until it is set aside by the court it is proper to give judgment upon it. Nothing is shown against the verdict in this case, but the opposite appears by the record. The trial court overruled a motion for a new trial, and in arrest of judgment in the case where the verdict was returned, and thereby in effect approved it. There is no bill of exceptions containing the evidence, or the instructions of the court, by which the verdict was induced. The motion for a new trial containing the exception to the verdict, and the exceptions to the rulings of the court upon such motion are absent from the record, and therefore nothing appears from which the sufficiency or validity of the verdict can be questioned, or the decision of this court adversely affecting it be required, according to the well settled practice, and we therefore conclude nothing remains for the trial court but to cause a judgment to be entered upon such verdict. By the authority above cited the court was powerless to render the judgment that was entered, and it will be reversed and the cause remanded to the Circuit Court with leave to move that court for a proper judgment on the verdict. Reversed and remanded.

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Ervel W. Hight v. Howard Naylor.

1. **TRESPASS**—*For False Imprisonment.*—A person, not an officer armed with process, who arrests and detains another against his will, when no criminal offense has been committed or attempted in his presence, is guilty of false imprisonment.

2. **FALSE IMPRISONMENT**—*Reasonable Cause Not an Essential Element.*—Want of reasonable or probable cause is not an essential element of a cause of action for false imprisonment, and averments to that effect in the declaration may be treated as surplusage.

3. **EXEMPLARY DAMAGES**—*When Proper in False Imprisonment.*—A young man of industrious, sober habits, came to a village for medicine and went directly to the doctor, for it, after which he went down the street in an orderly manner, looking at the store displays as he

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passed them. While thus occupied, he was summarily arrested by the defendant below, who, being very much excited, accused him in a loud voice of stealing his bicycle, and in language more forcible than elegant, refused to go with him to some of the best citizens of the village by whom he, plaintiff, could prove his identity and previous movements on that evening to establish his innocence, but sent for the village night watchman and ordered him to hold the plaintiff until the bicycle was found, telling him in the presence of a number of persons attracted to where they stood, that his bicycle had been stolen from the street, and he believed, by the plaintiff. The night watchman kept the plaintiff for one hour, exposing him to passers-by and refusing to allow him to see those by whom he claimed he could establish his innocence. *Held*, that the jury were justified in allowing punitive damages.

Trespass, for false imprisonment. Appeal from the Circuit Court of Christian County: the Hon. TRUMAN E. AMES, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed December 13, 1899.

JAMES B. RICKS, JOHN E. HOGAN and JAMES L. DRENNAN, attorneys for appellant.

The law is well established in this State that a private individual may make an arrest, but to justify, must show the guilt of the party arrested. *Dodds et al. v. Board*, 43 Ill. 95; *Kindred v. Stitt et al.*, 51 Ill. 401.

Under the issues made by the pleading, reasonable cause of suspicion was sufficient, and defendant below was entitled to have his case tried according to the pleadings. *Low v. Getty*, 18 Ill. 493; *Miller v. Balthasser*, 78 Ill. 302.

In an action of this character, unless there are circumstances of aggravation which would call for vindictive damages, the recovery should be confined to the actual injury. But conceding that vindictive damages may be allowed in the case, the judgment is much larger than the facts and circumstances would warrant. *Develeng et al. v. Sheldon*, 83 Ill. 390.

J. C. McBRIDE, W. B. McBRIDE and JAMES E. SHARROCK, attorneys for appellee.

A private person arresting another on suspicion of felony or crime does so at his peril, and unless he can establish the

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guilt of the person arrested, he is guilty of false imprisonment. *Smith v. Donnelly*, 66 Ill. 464.

A private person making an arrest upon suspicion of felony, to justify such an arrest must show that a felony has in fact been committed, and that there are reasonable grounds to suspect the party arrested with the commission of the crime; but if no felony was in fact committed by any one, then such arrest is illegal. *Newell on Malicious Prosecution and False Imprisonment*, 83, 84, 197; *Ency. of Law*, Vol. 1, 740.

An arrest by private person without process is a trespass if no criminal offense was committed or attempted in his presence, whether he had probable cause or not to believe the person arrested guilty. *Sundmacher v. Block*, 39 Ill. App. 553.

In an action of false imprisonment, where it is charged to have been made without reasonable cause, these words may be treated as surplusage and need not be proven. *Johnson v. Von Kettler*, 84 Ill. 315; *Newell on Malicious Prosecution and False Imprisonment*, 308, 309.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action of trespass by the appellee against the appellant, tried by jury in the Circuit Court of Christian County, where a judgment was rendered against the appellant for \$300 damages and costs. To reverse that judgment the appellant prosecutes an appeal to this court, and urges as grounds therefor that the court admitted improper and rejected proper evidence; gave improper and refused proper instructions; the verdict is contrary to the evidence, and the damages are excessive.

While the declaration as first filed contained four counts, the first and second were dismissed and the trial had on the third and fourth, both of which charged trespass and imprisonment against the will of the plaintiff and without reasonable or probable cause. The defendant filed a plea of not guilty, and two special pleas, in both of which he set up that he had probable cause. The plaintiff joined issue upon

the plea of not guilty, demurred to the two special pleas, and the court overruled it. The plaintiff did not reply to the special pleas, and the trial was had as though they had been traversed.

The bill of exceptions shows that the appellant was a witness in his own behalf, and when testifying admitted that he was not an officer, yet, against plaintiff's will, had arrested him while on the street of the village of Assumption; that at the time he accused him of stealing his bicycle, worth \$50; and that after he had arrested the plaintiff, he detained him some five minutes himself, and then turned him over to the night watchman of the village, with directions to hold him under arrest until the defendant found his bicycle; that the night watchman kept the plaintiff upon the street for some forty-five minutes, when defendant directed him to release the plaintiff, which he did; that after he had turned the plaintiff over to the night watchman defendant found that his bicycle had not been stolen, but only removed by a friend from the side of the street in front of defendant's place of business, where he had left it a short time before.

With these facts admitted there is no force in appellant's insistence that the verdict is contrary to the evidence, because confessedly the defendant, not being an officer with process, had illegally arrested and detained the plaintiff against his will when no criminal offense had been committed or attempted by the plaintiff in the presence of the defendant, which facts established plaintiff's cause of action and entitled him to a verdict. *Sundmacher v. Block*, 39 Ill. App. 553; *Dodds et al v. Board*, 43 Ill. 95; and *Kindred v. Stitt et al.*, 51 Ill. 401.

Want of reasonable or probable cause not being an essential element of a cause of action for trespass and illegal imprisonment without process, the averment in both counts, that the trespass and imprisonment complained of was without reasonable or probable cause, was mere surplusage and could be disregarded. *Johnson v. Von Kettler*, 84 Ill. 315; *Sundmacher v. Block*, *supra*; *Barnes v. North Trust*

Co., 169 Ill. 118; Burnap v. Wight, 14 Ill. 301; and Higgins v. Halligan, 46 Ill. 173.

The two special pleas, setting up that there was reasonable and probable cause, were not good pleas in bar of the action set out in either count of the declaration, and the court should have sustained the demurrer to them for that reason.

The court permitted the defendant to show that when he arrested and detained the plaintiff he was acting under the opinion that his bicycle had been stolen, for it was missing from the side of the street where he left it; and that shortly thereafter the plaintiff had been seen walking along the streets in that vicinity, looking into the windows and doors of the stores; thus the jury were informed concerning all the facts and circumstances which induced the appellant to make the arrest, and cause the detention of the appellee, that might be considered in mitigation of damages; and while the court did reject some evidence concerning this phase of the case, of which appellant complains and insists was prejudicial error, yet we think ample evidence was admitted in this respect to enable the jury to act intelligently on that question.

It is persistently urged by counsel for the appellant that the damages allowed are excessive and the judgment ought to be reversed for that reason. The record shows that the jury, by their verdict, fixed the damages at \$500, which amount the Circuit Court deemed excessive and required the plaintiff to remit \$200 thereof, or a new trial would be granted. The amount was remitted by the appellee and judgment was entered for the remaining \$300. The evidence disclosed that the plaintiff, a young man of industrious, sober habits, had come to the village of Assumption on the evening in question to get medicine for a sick lady; that he went directly to the doctor and got it and then went down the street in an orderly manner, looking at the store displays as he passed them. While thus occupied, he was summarily arrested by the appellant, who, being very much excited, in a loud voice accused him of stealing his bicycle,

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and when appellee denied the charge and requested appellant to go with him to some of the best citizens of the village, by whom he could prove his identity and previous movements on that evening, thus establishing his innocence, appellant, in language more forcible than elegant, refused that reasonable request, sent for the village night watchman and ordered him to hold appellee until the bicycle was found, telling him in the presence of a number of persons, attracted to where they stood, that his bicycle had been stolen from the street and he believed by the plaintiff. The night watchman kept appellee for one hour, exposing him to passers-by and refusing to allow him to see those by whom he claimed he could establish his innocence.

Thus it fully appears that the appellant willfully arrested and detained the appellee without any warrant of law whatever, and in so doing acted in a malicious and oppressive manner, with a wanton disregard of the natural rights and feelings of appellee, so that the jury were justified in allowing punitive damages. (Blanchard v. Burbank et al., 16 Ill. App. 375, and authorities cited.) And we are of opinion that \$300 damages are not excessive under such circumstances. (Siegel, Cooper & Co. v. Connor, 70 Ill. App. 116; affirmed in 171 Ill. 572; and Pearce v. Needham, 37 Ill. App. 90.)

We have examined with care the instructions given, as well as those refused, and are fully satisfied that no injustice was done appellant thereby; indeed, the instructions given at the instance of appellant were more favorable to him than the evidence justified.

After a careful inspection of the entire record, we find that substantial justice was done the parties thereto by the judgment rendered in the Circuit Court of Christian County; hence we affirm it. Judgment affirmed.

**G. B. Sidelinger et al. v. Henry Freeman, Assignee of
Strong & Romig, Insolvents, et al.**

1. *EXECUTIONS—Power of Constables Under.*—A constable has the statutory period of seventy days to make the money under justices' executions held by him, and they are liens upon the goods and chattels of the debtors from the time that they come into his hands.

2. *SAME—When Issued Within Twenty Days.*—The fact that the statute authorizes the issuing of an execution on a judgment before a justice of the peace in less than twenty days, does not enlarge or abridge the execution when so issued.

3. *CONSTABLES—Duty Under Executions.*—A constable with an execution must act under the command of the writ, and not by direction of the party in whose favor it is, except that such party may order the constable to delay, or not to execute the writ at all, but he can not hasten the time of its execution sooner than is prescribed by the statute.

Voluntary Assignments.—Appeal from the County Court of Vermilion County; the Hon. M. W. THOMPSON, Judge, presiding. Heard in this court at the May term, 1899. Affirmed. Opinion filed September 20, 1899. Rehearing denied, December 18, 1899.

LAWRENCE & LAWRENCE, attorneys for appellants.

PENWELL & LINDLEY, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This case arises in the proceedings in the County Court of Vermilion County, in the matter of the assignment of the firm of Strong & Romig, insolvents, who made an assignment for the benefit of their creditors to Henry Freeman, one of the appellees here, their estate being administered in that court.

A controversy arising among creditors of that firm in that court, as to their respective proportions of the distribution of a fund of \$856.37 in the hands of the assignee, the matter was properly submitted to that court, and it made the following order of distribution, to wit:

"Now comes Freeman, the assignee, and presents to the court his petition alleging that of the creditors of said insolvents who, within ninety days from the time he gave

notice to file claims with him, the following claim a preferred right or lien on the assets of said insolvents, as set forth in their respective claims:

The Jones-Earle Shoe Co., The James A. Lawrence Co., Maloney Bros., Helmig-Williamson Shoe Co., The Cady-Iverson Shoe Co., G. B. Sidelinger, W. F. Baum, Whitney & Wabill, H. S. Albright & Co., Palmer National Bank, Stevens & Berring and The American Mutual Insurance Co.

And the assignee prays that said priorities may be adjusted and determined and the assets of said estate distributed.

Also come said creditors claiming priorities, by their respective attorneys, and their cause coming on to be heard for the said purposes, and the court, having heard evidence and arguments of counsel and being fully advised, doth find that June 20, 1898, the said insolvents, Strong & Romig, as copartners, executed their deed of assignment for the benefit of their creditors to Harry L. Freeman, as assignee, which was filed for record same day at eight o'clock, A. M.; that June 18, 1898, they confessed by warrant of attorney, a judgment in favor of said Sidelinger for \$704 and costs in this court, and thereupon execution was issued and delivered to the sheriff, who thereupon levied upon the goods and fixtures aforesaid, and at same time levied a distress warrant thereon, as agent of W. F. Baum, the owner of the store building. On June 22, 1898, it appearing that there were sundry executions in the hands of the constables of said county against the said insolvents, existing at the time and prior to said levy, the plaintiffs in which were claiming liens upon said property, and thereupon said claimants, the sheriff and assignee, and all parties excepting Strong & Romig, The Palmer National Bank and Whitney, Wabill & Co. entered and appeared in said court upon a petition filed, and thereupon the court ordered said assignee to receive said property from the sheriff, whereupon the same should become assets in his hands, and should be by him converted into money and to be held to abide the further order of the court as to said several claims of priority, and the final disposition thereof to abide the further order of the court.

And the court further finds that said assignee, having duly qualified as such, on the 22d day of June, gave the notice required by the statute, to all persons having claims against said insolvents to present the same to said assignee within three months from said date; and that at the expi-

ration of said time, namely, October 4, 1898, the said assignee reported and filed with the clerk of this court a true list, under oath, of all such creditors who had claimed to be the creditors of said insolvents, among whom were H. S. Albright & Co., \$141.63; G. B. Sidelinger, \$715.45; W. F. Baum, \$116.28; James A. Lawrence Co., \$140.67; Whitney & Wabill, \$614.65; Palmer National Bank, \$650.04; Cody-Iverson Shoe Co., \$84.25; Maloney Bros., \$624.25; Stevens & Berring, \$32.40; American Mutual Fire Insurance Co., \$30.35; Helmig-Williams Shoe Co., \$52.65; Jones-Earle Shoe Co., \$41.60; James A. Bannister Co., \$201.75.

And the court further found that no person interested, as creditor or otherwise, by himself or attorney, appeared within thirty days after the filing of said report, and filed any exception with said clerk to the claim or demand of any creditor as aforesaid; that said assignee had converted said property into money, and now asks direction as to the manner of its distribution among the creditors of said insolvents.

Upon due consideration the court doth order and decree that said assignee, after paying all costs and expenses of said assignment, shall distribute the remaining assets, namely, \$857.57, to said creditors, whose claims were in judgment and in which executions were in the hands of officers at the time of the making of said assignment, shall be paid according to the seniority of the liens of said executions; that is to say, Jones-Earle Shoe Co., \$41.60; Cody Iverson Shoe Co., \$84.25; James A. Bannister Co., \$201.75; Helmig-Williams Shoe Co., \$52.65; James A. Lawrence Co., \$140.67; Maloney Bros., \$624.25; American Mutual Fire Insurance Co., \$30.35; Stevens & Berring, \$32.40; H. S. Albright & Co. \$141.63; G. B. Sidelinger, \$715.45; W. F. Baum, \$116.28, and to distribute the residue to the other creditors who have presented their claims as aforesaid.

The court finds that the executions on the judgments of Palmer Bank and Whitney & Wabill were not delivered to the sheriff until after the execution and filing for record of said deed of assignment, and that they have not any prior lien upon said assets."

And the appellants not being satisfied with such order and distribution, appealed therefrom to this court.

The evidence shows that various executions on justices' judgments, in favor of the appellees, other than the assignee, and against the insolvent firm, were in the hands of con-

stables when the assignment was made, some of them a considerable length of time, but less than seventy days, and that demands had been made by such constables upon said firm for payment thereof, but they were not paid.

G. B. Sidelinger, one of the appellants, later obtained a judgment in the County Court of Vermilion County against the firm, upon a note he held against them, and caused an execution to be issued thereon and at once placed it in the hands of the sheriff of that county, who immediately levied the same upon the stock of boots and shoes of the firm.

The firm at once made the assignment hereafter mentioned, and the assignee, Freeman, procured an order of that court directing the sheriff to surrender the stock of boots and shoes so levied upon by him, to the assignee, preserving the rights of all parties interested therein as they then stood. The assignee sold the stock and converted it into money, amounting to \$856.37, which constitutes the fund in controversy in this case.

The principal contentions of the appellants are:

(1) That the executions from the justices' courts having been sworn out, the statute required them to be immediately levied, which not being done, subordinated them to their executions.

(2) That the reason for the delay in levying the executions held by the constables, is that it should be inferred that they are either suspended or that the owners impliedly consented to suspend them, for which reason they are subordinated to the liens of the executions of appellants.

We are of the opinion, however, that such contention ought not to be sustained under the facts in this case.

The constables had the statutory period of seventy days to make the money under the executions held by them, and they were liens upon the goods and chattels of the debtors from the time they came into the constable's hands. The fact that the statute authorizes the issuing of an execution on a judgment before a justice of the peace in less than twenty days, does not enlarge or abridge the writ when so

issued; hence the fact that such executions were so issued makes no difference in that regard, but they were in effect like other executions issued after the expiration of twenty days. The evidence fails to show that the parties in whose favor these executions in the hands of the constable were, or their attorneys, consented to or authorized any delay in their levy or collection, but on the contrary it does show that the attorneys of such parties were pushing the constables to collect and urging the debtors to pay.

We think that where the statute limits the time in which an officer must do a particular thing, such officer complies with its mandate when he acts within the prescribed period; especially ought this to be true concerning the rights of parties interested in such acts, who have no power to control the acts of the officer as to the time in which he must act.

A constable with an execution must act under the command of the writ, and not by direction of the party in whose favor it is, except that such a party may order the constable to delay or not to execute the writ at all; but he can not hasten the time of its execution sooner than is prescribed by the statute.

It is contended by some of the appellees that the claim of appellant Sidelinger, upon which his judgment and execution were based, is not a partnership debt of the insolvents, but we think the evidence proves it was. To make it such it was not material that the note evidencing it should be signed in the firm's name. It was signed by both members of the firm, and the evidence shows that what the note represented went into the firm's assets.

Finding no reversible error was committed by the County Court in the order made by it in this case, we affirm it. Order affirmed.

**Mary Duffner, Exr'x, v. John Ball et al., Impleaded
with Girard Mercantile Association.**

1. **PLEADING—*Denial of Liability on a Promissory Note.***—By properly pleading to a declaration on a promissory note, signed in the name of a corporation by its officers, instead of demurring to it, the officers who are sued upon it can raise the question as to whether the note is the promise of the corporation alone or of it and the officers jointly.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Macoupin County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded, with directions. Opinion filed December 13, 1899.

DAVID E. KEEFE and PEEBLES & PEEBLES, attorneys for appellant.

KNOTTS & TERRY, attorneys for appellees.

MR. JUSTICE BURROUGHS delivered the opinion of the court.

This was an action in assumpsit by Mary Duffner, executrix of the will of Xavier Duffner, deceased, against the Girard Mercantile Association and the appellees jointly. The declaration contained one special and four of the common counts, the special count being as follows, to wit:

“In this action Mrs. Mary Duffner, the plaintiff, as executrix of the last will and testament of Xavier Duffner, deceased, by Peebles, Keefe and Peebles, her attorneys, complains of Girard Mercantile Association, John Ball, A. F. Hamilton and George Ball, defendants, of a plea of trespass on the case on promises.

For that, whereas, the defendants on the 23d day of May, in the year 1891, in the county of Macoupin and State of Illinois, were indebted to one Xavier Duffner in the sum of \$1,000, and being so indebted the defendants, in consideration thereof, on that day made and executed their promissory note to the said Xavier Duffner, and delivered the same, which note is in the words and figures following, to wit:

\$1,000.00

GIRARD, ILL., May 23, 1891.

One year after date we promise to pay to the order of Xavier Duffner, one thousand dollars, at Girard, Ill., value received, with interest at eight per cent per annum.

GIRARD MERCANTILE ASS'N.

JOHN BALL, President.

A. F. HAMILTON, Treas.

GEORGE BALL, Sec'y.

By means whereof, the defendants became liable to pay to the said Xavier Duffner said sum of one thousand dollars, according to the tenor and effect of the said note, and being so liable, the defendants, in consideration thereof, then and there promised the said Xavier Duffner to pay the said sum of money in the said promissory note mentioned, according to the tenor and effect of said note. Yet although the day of payment in said note mentioned has long since elapsed, the defendants have not paid the same to the said Xavier Duffner in his lifetime, but refused so to do; and the plaintiff avers that the said Xavier Duffner departed this life on or about April 1, 1898, leaving a last will and testament, which has been admitted to probate and record by the County Court of Macoupin County, Illinois, in which will this plaintiff is nominated as the sole executrix thereof, and she has been appointed as such executrix by the said County Court of Macoupin County, and that she is now acting in said capacity. By means whereof the defendants became liable to pay to the plaintiffs the said sum of money in the said promissory note mentioned, according to the tenor and effect thereof, and being so liable, the defendants promised the plaintiff to pay to her the said sum of money in the said promissory note mentioned, according to the tenor and effect thereof. Yet the defendants have not paid the same or any part thereof, nor the interest thereof, to the plaintiff since the death of the said Xavier Duffner, although often thereto requested, but they refuse and neglect to pay the same, to the damage of the plaintiff of fifteen hundred dollars, whereof she brings her suit," etc.

The appellees, John Ball, A. F. Hamilton and George Ball, interposed a general demurrer to that count which the court sustained; plaintiff excepted and stood by the count; the court then gave judgment against the plaintiff for costs, and she excepted.

The appellant brings the case to this court by appeal, and assigns the following errors, to wit:

“ First. The Circuit Court erred in sustaining the defendant's demurrer to the first count of the plaintiff's declaration.

Second. The Circuit Court erred in rendering judgment in favor of the defendants, and against the plaintiff for costs.”

Counsel for the appellant contend that the special count of the declaration sets out a good cause of action against all the defendants, and therefore the court committed prejudicial error when it sustained the demurrer thereto; while counsel for appellees insist that the note set out *in haec verba* in that count, by its terms and the manner of signing, shows that the Girard Mercantile Association, by the appellees as president, treasurer and secretary, executed it, and that the corporation alone is therefore liable; hence the court properly sustained the demurrer to that count, and, since the plaintiff stood by the count, the court also properly entered judgment against her for costs.

That the defendants were indebted to plaintiff's decedent in the sum of \$1,000, and in consideration thereof executed and delivered to him their promissory note, in words and figures as set out in the special count, are, in our opinion, facts well pleaded, which, together with other facts manifestly well pleaded, state a good cause of action against all the defendants; and under the well-established rule of pleading the demurrer admitted all these facts, therefore the Circuit Court should have overruled the demurrer, and committed reversible error when it sustained the same.

Counsel for appellant and counsel for appellees, in their respective briefs and arguments filed in this court, have discussed the question whether the note described *in haec verba* in the special count, is the promise of the corporation alone or of it and the appellees jointly; but we do not feel called upon to decide that question, because it is not involved in the state of case made.

By properly pleading to the special count, instead of demurring to it, the appellees could have raised that question, and the court could then properly adjudicate upon it, as was done in *Franklin v. Johnson*, 147 Ill. 520.

For the errors above pointed out, we reverse the judgment of the Circuit Court and remand this case to that court, with directions to overrule the demurrer to the first count of the declaration, and then proceed therein as to law and justice appertain.

Judgment reversed and cause remanded, with directions.

Julian P. Lippincott v. The Board of Education.

1. REVENUE—*Jurisdiction of the Appellate Court in Cases Relating to.*—Under Section 88 of the Practice Act, "in all cases relating to the revenue," appeals must be taken directly to the Supreme Court.

Bill for Injunction.—Appeal from the Circuit Court of Morgan County; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the May term, 1899. Dismissed. Opinion filed December 20, 1899.

JULIAN P. LIPPINCOTT, *pro se.*

CHARLES A. BARNES and JOHN J. REEVE, attorneys for appellee.

OPINION PER CURIAM.

This was a bill in chancery, brought by Julian P. Lippincott, as a resident and taxpayer of the city of Jacksonville, against the Board of Education of Jacksonville School District, among other things, to enjoin the latter from "levying and collecting, or attempting to levy and collect, or certifying to the city council, any tax in excess of two per centum for school purposes, without being authorized to do so by a majority of the voters of the district at an election to be held for that purpose."

After a hearing, the court entered a decree dismissing the bill, to reverse which appellants bring the case to this court by appeal. The appellee insists that inasmuch as the case relates to the revenue, this court is without jurisdiction to

Greene v. Casey.

entertain such appeal, because, by the express provision of Section 88 of the Practice Act, "in all cases relating to the revenue" appeals must be taken directly to the Supreme Court.

We think there is no doubt but that this case is one relating to the revenue, within the meaning of the said section, and that this court has no jurisdiction of this appeal for that reason. See *Phoenix Grain and Stock Exchange v. William H. Gleason*, 22 Ill. App. 373; *Webster v. People*, 98 Ill. 343; *Gunning et al. v. People ex rel.*, 76 Ill. App. 574; and *Claypool Drainage & Levee District v. C. & A. R. R. Co.*, 81 Ill. App. 433.

The appeal will therefore be dismissed, with leave to appellant to withdraw the transcript of the record, his abstracts and briefs, also to appellee to withdraw its brief. Appeal dismissed.

**John Greene, Assignee of Pritchett & Trexler, et al., v.
A. Casey et al.**

1. **MARSHALING ASSETS—*Partnership and Individual Liabilities.***—It is a familiar rule in marshaling assets that partnership assets shall be taken in discharge of partnership liabilities and individual assets in discharge of individual liabilities.

Voluntary Assignments.—Appeal from the County Court of Montgomery County; the Hon. M. J. McMURRY, Judge, presiding. Heard in this court at the November term, 1899. Reversed and remanded. Opinion filed December 20, 1899.

LANE & COOPER, attorneys for appellant.

J. M. TRUITT, attorney for appellees.

Statement.—Prior to April 8, 1898, Martha Pritchett and Lewis Trexler were engaged in merchandising at Fillmore, Illinois, under the name of Pritchett & Trexler. On that day Martha Pritchett died, and Trexler continued

the business under the firm name until July 12, 1898, when he made an assignment for the benefit of creditors. John Greene was appointed as assignee and duly qualified as such.

In the County Court of Montgomery County, the court taking administration of the insolvent estate, it was found that the firm on the 12th of July, 1898, was indebted to various creditors for goods purchased prior to the 8th of April, 1898, in the sum of \$2,335.91; that the indebtedness for goods purchased by Trexler between the 8th of April and the assignment was \$2,732.45, and that Trexler's individual indebtedness was \$392.86. In that finding the court did not include a judgment of about \$800 in favor of the McKee Shoe Company, which the court held to be a preferred claim by reason of an execution levy made prior to the date of the assignment. If the claim of the McKee Shoe Company was for goods sold prior to the death of Martha Pritchett, the indebtedness of the first class mentioned was over \$3,000, instead of only \$2,335.91. The court further found that the indebtedness on the 1st of April amounted to \$3,776.74, and that the assets consisted of goods inventoried at \$5,211.25; cash, \$124.94; good accounts, \$500, and doubtful accounts, \$285.96.

Greene reported that he had received from the sale of goods \$5,090.44, which he sold at retail, excepting the last \$1,400 (realized on a lump sale at a discount of forty per cent) and that the attending expense amounted to \$1,235.60, leaving a balance to be paid on claims of \$3,854.84. After deducting the preferred claim of the McKee Shoe Company there was an insufficient balance to pay the other creditors, and the County Court ordered the assignee to make distribution *pro rata* among all the creditors according to the amount of their respective claims. From that order this appeal is prosecuted.

MR. JUSTICE HARKER delivered the opinion of the court. Appellees have not filed a brief in this case, and we could reverse the order of the court *pro forma* for that reason. As the funds are in the control of the County Court, however, we have concluded to express our views upon the

question involved for the guidance of that court in making the order after the cause is remanded.

It is a familiar rule in marshaling assets that partnership assets shall be taken in discharge of partnership liabilities, and that individual assets be taken in discharge of individual liabilities. As the claims of partnership creditors can not be satisfied out of the individual assets of any member of the partnership until the claims of his individual creditors have been satisfied, so the claims of individual creditors can not be satisfied out of the interest which the individual partner has in the partnership assets until after all partnership creditors are paid. In this case it is contended that all the goods taken by the assignee, those purchased by the surviving partner after the death of Martha Pritchett, as well as those purchased before, were partnership assets, but that in distributing the proceeds the creditors having claims for goods sold prior to the death of Martha Pritchett only, should be treated as partnership creditors, while those having claims for goods sold after that time should be treated as individual creditors of Trexler. It is insisted that after paying in full the first mentioned class of creditors, one-half of the balance should be paid to the executor of Martha Pritchett and the other half be distributed among the individual creditors of Trexler *pro rata*.

From the time of the dissolution of the partnership by the death of Martha Pritchett to the time of the execution of the deed of assignment, the partnership liabilities were reduced from \$3,776.74 to \$2,335.91, and the amount of the McKee Shoe Company judgment; the business was carried on in the firm name and the goods purchased by Trexler were treated as partnership assets. The reduction of the old indebtedness nearly \$1,000, was, no doubt, accomplished in some measure by a sale of the goods purchased by him after the death of his partner. If that is true, an order that would allow her estate the benefit of such a reduction and give it one-half of the balance after paying the old claims would manifestly be inequitable to the creditors who had sold the goods to Trexler after her death.

The evidence in the record before us does not disclose suf-

ficient facts to enable us to direct exactly what order should be made. If after hearing further evidence the County Court shall find that the fair cash value of the assets on hand at the time of the death of Martha Pritchett, after deducting expenses and costs, equaled or exceeded \$3,776.74, then the claims which existed at the time of her death should be paid in full. If the court should find that the fair cash value after the deduction of expenses and costs, was less than that sum, those claims should be paid *pro rata* in the ratio that the net value bears to \$3,776.74. The balance should be paid *pro rata* to the creditors who sold to Trexler after the death of Martha Pritchett. It would be unjust to the last named creditors, under the circumstances, to pay any of the balance to the executor of Martha Pritchett or other creditors of Trexler. The order will be reversed and the cause remanded for further action by the County Court.

George H. Holeton v. Hannah M. Thayer et al.

1. **ADMINISTRATION OF ESTATES**—*When Legatees Must Account for Moneys Received.*—Where an heir receives the proceeds of the sale of an estate the burden is upon him to account for the same.

2. **EQUITY PRACTICE**—*When Jurisdiction Will be Retained.*—Where a court of equity acquires jurisdiction for any purpose, it will retain it for every purpose, to the end that full and complete justice may be done between the parties and an end put to the litigation.

Bill to Remove a Cloud, etc.—Appeal from the Circuit Court of Vermilion County; the Hon. FERDINAND BOOKWALTER, Judge, presiding. Heard in this court at the May term, 1899. Affirmed in part, reversed in part, and remanded. Opinion filed September 20, 1899. Rehearing denied December 13, 1899.

ADAMS & BLACKBURN, attorneys for appellant.

DYER & WALLBRIDGE, attorneys for Hannah M. Thayer, appellee.

WILSON & BUCKINGHAM, attorneys for J. W. Holeton, appellee.

Holeton v. Thayer.

MR. JUSTICE WRIGHT delivered the opinion of the court.

In the beginning this was a bill in equity, filed by Hannah M. B. Thayer against appellant and others, to quiet title to eighty acres of land rendered uncertain by the will of her grandfather, Francis H. Holeton, from whom she derived title, and to remove as a cloud upon such title the claim of appellant to the specific legacy of \$1,000 named in the will. John W. Holeton and appellant, sons of Francis H. Holeton, being defendants to the bill of appellee Thayer, filed separate cross-bills, the former to remove a cloud upon the land devised to him by the will of the father for the same cause stated in Mrs. Thayer's bill, and the latter, to enforce a lien claimed in his favor against lands devised by the will for the payment of the specific legacy of \$1,000, given to him by the same will, and also for an accounting and distribution of certain money of the proceeds of lands directed to be sold under the terms of the will, and for rents of other lands. Upon the hearing the court decreed in favor of complainant in the original bill, John W. Holeton, upon his cross-bill, and against George H. Holeton, from which the latter appeals to this court.

The will of Francis H. Holeton, deceased, was admitted to probate in Vermilion county July 2, 1888, by which he gave all his property, both real and personal, to his wife, Hannah S. Holeton, for her use while she might live, and at her death to his son, John W. Holeton, and to his granddaughter, Hannah M. Brenn (now Thayer), eighty acres of land each, described in the will as being in Vermilion county, and to his son, George H. Holeton, \$1,000; provided, that if there should not be that amount of money in hand arising from the sale of real estate or personal property, the balance should be equally divided and paid by John W. Holeton and Hannah M. Brenn; the will directed the home place to be sold and the proceeds applied on any indebtedness that he might owe, the balance, if considerable, to be loaned on real estate security, and appointed John W. Holeton executor.

Hannah S. Holeton, the widow, died in 1897. John W.

Holeton never qualified as executor. The parties, after the will was probated, made a written agreement concerning a distribution of the property, but it was never executed, and from the evidence, apparently abandoned by all, and the will was thereafter relied and acted upon as the basis for such distribution and title. After this agreement the parties joined in a sale and deed of conveyance of the home place for \$3,000, the money going into the hands of John W. Holeton, who paid a mortgage of \$1,500 upon the lands of the estate, and \$1,000 to George H. Holeton, who, in his cross-bill, claimed that the money so paid him from the proceeds of such sale was in consideration of his joining in the deed of conveyance of the home place, and that it was not a payment of the specific legacy mentioned in the will, which, as he averred, was still due and unpaid, and for which he was entitled to a lien for its payment against the lands of John W. Holeton and Hannah M. B. Thayer. After an examination of the evidence we think it fully warranted and sustains the finding of the chancellor, that the \$1,000 paid to George H. Holeton was received and accepted by him in payment of the legacy named in the will of his father. Had the executor qualified, or had an administrator with the will annexed been appointed, the home place could have been sold without George H. Holeton joining in the deed, and it is not reasonable to suppose it was agreed by others interested that he should receive \$1,000 merely to avoid such appointment. He had repeatedly declared in his letters that he wished to stand by the will, and there was no other basis upon which the \$1,000 could be rightfully paid to him, unless the will was in some way disregarded, and that would have been against his expressed wish and the interest of others. He got just what was willed to him, and we can not conceive he has any just ground of complaint in this respect, and it is our opinion the decree of the court in this regard is fully sustained by the evidence, and it was proper to free the lands from the shadow of such a claim.

Inasmuch as it is admitted that John W. Holeton received the \$3,000, proceeds of the sale of the home place,

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the burden was upon him to account for the same. The evidence does not in any satisfactory manner account for the \$500 remaining in his hands after paying his brother George and the mortgage. It is true he claims to have paid it out upon the indebtedness of the estate, but there is no evidence of other debts than the \$1,500 mortgage. If he assumed to pay debts without having them probated against the estate, he thereby assumed the burden of producing evidence that would be sufficient to prove such claims in the Probate Court in case of objection.

If he received rents, and they were unexpended in his hands when the mother died, they also should be accounted for. We are not satisfied with the decree upon the subject of the accounting for the balance of the proceeds of the sale of the home place, and the alleged rents of land while the mother was living. We have no doubt the rule is that where a court of equity acquires jurisdiction for any purpose it will retain it for every purpose, to the end that full and complete justice may be done between the parties and an end put to the litigation.

The decree of the Circuit Court will be reversed so far as it relates to the balance of \$500 proceeds of the sale of the home place, and in respect to the alleged rents, and the cause remanded to the Circuit Court, with directions to give the parties leave, if they shall so desire, to re-try the cause with respect to those parts of the decree hereby reversed, and the decree of the Circuit Court in all other respects will be affirmed, and the costs of this court equally divided between appellant and the appellee John W. Holton. Affirmed in part, reversed in part, and remanded.

**Emma Gaby, for Herself and Montgomery County, v.
Mary Palmer Hankins.**

1. *GAMBLING—Recovery of Money Lost ut.*—Under Section 183 of the Criminal Code a building used as a gaming house, or which the owner knowingly permits to be used for gaming purposes, may be sold

to pay a judgment recovered under Section 132 of such Code, and proceedings may be had to subject the same to the payment of such judgment, either before or after execution issues against the property of the person against whom the judgment was recovered.

2. *SAME—What is Sufficient to Put the Owner of Premises upon Inquiry.*—The fact that the owner, after receiving complaints that his premises were being used for gambling purposes, visited them and saw there a poker table and other furniture, this, even if he were not familiar with the paraphernalia of a gambling room, was sufficient to put him upon inquiry.

3. *SAME—Remedy in Chancery.*—The court is of opinion that a bill in equity can be maintained to subject property used for gambling purposes to the payment of a judgment recovered by special action on the case against the winners of money lost at gaming in such property.

4. *SAME—Trial by Jury Not a Matter of Right.*—The defendant in a suit under Section 133 of the Criminal Code is not entitled to a trial by jury as a matter of right, and the finding of the jury in such a proceeding is merely advisory.

5. *EQUITY PRACTICE—In Jury Trials.*—If a judge, sitting as a chancellor, prefers, by reason of the unsettled condition of his mind, after hearing the evidence submitted upon an issue, to have the advice of another jury, he should set the verdict aside and impanel another jury to retry such issue.

Bill to Subject Property Used for Gambling Purposes to the Payment of a Judgment.—Error to the Circuit Court of Montgomery County; the Hon. SAMUEL L. DWIGHT, Judge, presiding. Heard in this court at the May term, 1899. Reversed and remanded. Opinion filed December 13, 1899.

W. A. HOWETT and LANE & COOPER, attorneys for plaintiff in error.

CREIGHTON & GARDNER, attorneys for defendant in error.

MR. JUSTICE HARKER delivered the opinion of the court.

The plaintiff in error presented to the Circuit Court a bill in equity, charging that the defendant in error leased certain real estate, which she owned in the city of Litchfield, to one F. M. Lloyd, who sublet it to John M. Smith, William Stout and George Felkel, to be used as a gambling house; that in the spring of 1892 John H. Gaby, the husband of plaintiff in error, lost \$1,628 in the house; that she subsequently brought suit against Smith, Stout, and Felkel

under Section 132, Chapter 38 of the Revised Statutes, to recover treble the value of the money so lost, one-half to her use and one-half to the county of Montgomery, and recovered a judgment against them for \$4,914; that an execution was issued on said judgment but was returned *nulla bona*, and that she has not been able to obtain satisfaction of the judgment because of the insolvency of Smith, Stout and Felkel. The bill charged that the use of the premises as a gambling house was with the knowledge and consent of defendant in error, and prayed that they be subjected to the payment of the judgment. An answer was filed admitting ownership of the property, and the leasing to Lloyd, but denying that it was leased to Lloyd to be used by him as a gaming house, or that it was so used either by him, Smith, Stout or Felkel, with the consent or knowledge of defendant in error. After the filing of a replication, the following issues of fact, at the request of the defendant in error, were submitted to a jury: First, did the defendant lease the premises to be used by him as a common gaming house? Second, did Lloyd sublet the premises to Smith, Stout and Felkel to be used as a gaming house, with the knowledge and consent of the defendant? Third, did the defendant knowingly permit the premises to be used by any of said parties as a gaming house? The jury found for the defendant upon each of the issues, but the court, upon the hearing of a motion for new trial, set aside the verdict, and directed that the issues be submitted to another jury. Subsequently a rehearing of the motion for a new trial was argued and the court vacated the order setting aside the verdict. At the next term of court, the motion to set aside the verdict was renewed, and a motion made by the plaintiff in error for a decree in her favor notwithstanding the verdict. Both motions were overruled, and an order dismissing the bill, for the reason that there is no remedy in chancery in this character of case, and for the further reason that the verdict of the jury is conclusive, entered.

Section 132 of the Criminal Code provides that any

person who has lost ten dollars or more, at cards, dice, or other games of chance, may sue and recover from the winner the money so lost, and that in case he shall not so sue within six months, it shall be lawful for any person to sue for and recover treble the amount of money lost, by special action on the case against the winner, one-half to the use of the county and one-half to the person suing. Section 133 provides that any building or premises used as a gaming house, or which the owner knowingly permits to be used for gaming purposes, may be sold to pay any judgment recovered under section 132, and that proceedings may be had to subject the same to the payment of such judgment, either before or after execution shall issue against the property of the person against whom the judgment was recovered.

In this case the evidence shows that John H. Gaby lost large sums of money in a common gaming house, operated by Lloyd, Smith, Stout and Felkel, upon premises leased by defendant in error to Lloyd; that no suit to recover back the money within six months after losing the same having been brought by him, his wife, the plaintiff in error, recovered a judgment for her use and that of the county, for treble the amount lost, \$4,914, against Smith, Stout and Felkel, and that because of the insolvency of the defendants, the judgment has never been satisfied.

That the house in question was a common and notorious gaming house for years is not disputed. The only frictional question of fact in the controversy is, whether defendant in error knowingly permitted it to be used as such.

A careful review of the record leads us to the conclusion that the finding of the jury upon that issue is against the preponderance of the evidence. That the upstairs room of the building in question was used for gambling purposes, for several years before Gaby lost his money, was a matter of common repute in Litchfield. Complaints had been made to the defendant in error of the bad character of the house. She, at one time, after receiving those complaints, visited the room while occupied by Smith, Stout and Felkel, and there

saw a poker table and other furniture which, even if she was not familiar with the paraphernalia of a gaming room, was sufficient to put her on inquiry. She knew that Lloyd was indicted for keeping the house as a common gaming house, appeared as a witness when he was tried. She knew that the grand jury of the county had returned an indictment against her under a former name by permitting the house to be used as such.

The trial court evidently entertained the same view, for when the motion for a new trial was first argued, the verdict was set aside.

It is most earnestly contended by counsel for defendant in error that a bill in equity can not be maintained to subject the property of the owner to the payment of a judgment recovered by special action on the case against the winners of money lost at gaming. For the reason that the statute is a highly penal one, and that the beneficiaries of the judgment are not the parties who lost the money, it is urged that unless there is some legislative provision for the remedy being enforced by bill in chancery, the door of that branch of the court will be closed against a litigant seeking satisfaction of a judgment out of the property where the money was lost.

It occurs to us that counsel would be in better position to urge that contention had they raised the question by demurrer to the bill. Instead of demurring, they filed an answer denying the material averments in the bill, and requested that a jury be impaneled to try the issues of fact. We can not agree with counsel's contention as a proposition of law, however. The question has never been considered by our Supreme Court, or either of the Appellate Courts of the State, so far as we are advised. The provision is identical with the one contained in section 10 of the dram shop act, which makes the property, in which was sold the liquor that occasioned the injury to a party recovering a judgment, subject to sale to satisfy the judgment. We have never entertained a doubt as to the right of a party seeking satisfaction of a judgment out of the owner's property,

under section 10 of that act, doing so by bill in chancery. While the right has not been expressly declared by our Supreme Court, it has, at least, been countenanced by the Supreme Court and by one of the Appellate Courts. *Bell v. Cassem*, 158 Ill. 45; *Castle et al. v. Fogarty*, 19 Ill. App. 442; *Bell v. Cassem*, 56 Ill. App. 260.

We can not agree with the contention of defendant in error, and the holding of the court below, that the verdict of the jury was conclusive. This is not a criminal prosecution, but a civil proceeding to enforce a penal statute, and there can be no greater reason why the finding of the jury for the defendants should be regarded as conclusive than in an action of debt to recover a statutory penalty.

Defendant was not entitled to a trial by a jury as a matter of right, and the finding of the jury was merely advisory. If the court was not satisfied with the verdict, a decree should have been rendered for the complainant, notwithstanding the verdict, or it should have been set aside and the cause submitted to another jury. If the evidence convinced the mind of the court that the preponderance upon the issues tried was with the complainant, then it was his duty to grant the relief sought by the bill, regardless of what the jury had said about it. If he preferred, by reason of the unsettled condition of his mind, after hearing the evidence, to have the advice of another jury, he should have set the verdict aside and impaneled another jury to try the issue. We take it that such was the condition of the court's mind at the time of sustaining the motion for a new trial and entering an order to submit the issues to another jury. For that reason we do not feel warranted in reversing the decree with directions to render a decree granting the relief sought by the bill. We prefer to reverse the decree and remand the cause for further proceedings in the Circuit Court. **Reversed and remanded.**

CASES
IN THE
APPELLATE COURTS OF ILLINOIS

FIRST DISTRICT—MARCH TERM, 1899.

Martin Jelinski v. The Belt Ry. Co. et al.

86 535
189 149

1. **RAILROADS—Duty Toward Trespassers.**—Toward a trespasser using the yards or tracks of a railroad company for foot passage, and without an invitation to do so, the company is under no obligation of care and caution in the movement of its trains, and can not be charged with liability except in case of willful or wanton negligence.

2. **SAME—Use of Tracks by Assent or Invitation.**—If the place at which a person is injured in passing over a railroad track is not a public street, but has been so far used by the public as to show an invitation or assent by the company to such use, the rule as to trespassers has not been applied, but railroad companies have been held obligated to the exercise of care in the movement of their trains in relation to such ways and the people.

3. **SAME—Who are Trespassers.**—A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and one who travels upon such right of way, as a foot-way, and not for any business with the railroad, is a wrongdoer and a trespasser; and the mere acquiescence of the company in such user does not give right to so use it, or create any obligation for his especial protection.

4. **SAME—Effect of Permission to Pass over Tracks.**—A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.

5. **SAME—Running Trains at a Greater Rate of Speed than Allowed by Ordinance.**—The fact that a railroad company is running its train at a greater rate of speed than allowed by ordinance does not relieve persons from the exercise of ordinary care, nor can the speed of the train

alone be regarded as furnishing a sufficient reason for holding that an injury was willful or wanton.

Action in Case.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 18, 1900.

Statement.—Appellant brought this suit to recover for personal injuries sustained, it is alleged, through negligence of appellee. Appellant resided on the West Side of the city of Chicago. At the time of the injury in question he was attempting to go from the South Side of the city to his home upon the West Side. He started from a point on Twenty-first street. It was necessary to cross the Chicago river in order to reach his home. There were bridges for team and foot transit upon Twenty-second street south, and upon Sixteenth street north. There was also a railroad bridge, known as the Pennsylvania bridge, which crossed the river between these two public bridges. It was a private bridge, but could be crossed by foot passengers. Appellant determined to cross the river by way of the Pennsylvania railroad bridge. To reach this bridge he went to Twentieth street and proceeded west upon Twentieth street to its western end, where it abuts the railroad yards used by appellee. The entrance upon the Pennsylvania bridge was almost directly west of this western terminus of Twentieth street. There was no street, team-way or foot-path from the end of Twentieth street to the railroad bridge. But there was a drive-way for teams, partially planked and graveled, which proceeded from the western terminus of Twentieth street to an elevator, located in the yards and northwesterly from the end of Twentieth street, and the evidence discloses that such drive-way was also used by foot passengers in going to and from the elevator. Appellant proceeded westerly from the terminus of Twentieth street across the tracks, and upon this drive-way toward the elevator. It does not definitely appear from the evidence why he abandoned a straight course to the west toward the bridge and deflected to the northwest toward the elevator,

except it was for the purpose of getting around a train which stood north and south across his course. He had no business at the elevator, was not going there, and used the road to the elevator merely on his way to the railroad bridge. While attempting to pass around the northern end of the train of appellee, which stood across his course, the train was backed, without warning of its approach, and ran over and injured appellant. There was evidence tending to show that the train was started without the ringing of a bell or blowing of a whistle, and contrary to the statute in that regard. Appellant was accompanied by one person. There was no evidence to show that, at the time he was injured, there were any number of persons passing through the yards, to or from the elevator, or elsewhere, or that there were any other circumstances requiring unusual caution on the part of appellee in moving its trains through its yards.

Upon the trial the court, at the close of the evidence presented by appellant, directed a verdict of not guilty. From judgment upon such verdict this appeal is prosecuted.

EDWARD MAHER and J. V. O'DONNELL, attorneys for appellant.

EDGAR A. BANCROFT, attorney for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

The only question presented upon this appeal is as to whether the court erred in peremptorily directing a verdict of not guilty.

It is contended by counsel for appellant, first, that appellant was upon a public way, crossing the tracks of appellee, viz., the wagon track to the elevator; that he was rightfully there; that such public way was used by the public with consent of appellee, and that therefore the appellant was not a trespasser; and that the appellee owed him duty in exercise of ordinary care to avoid injuring him

while he was thus using such public way. It is contended, secondly, that the negligence of appellee in starting its train, without the warning required by the statute, was such willful and wanton negligence as would render it liable even to a trespasser thereby injured.

In deciding the first question, it is necessary to determine whether the appellant was in such use of the passage-way over the tracks as to be entitled to claim that appellee owed a duty of care toward him.

There is a long line of decisions of this State which hold that, as toward a trespasser using the yards or tracks of a railroad company for foot passage, and without invitation thereto, the railroad company is under no obligation of care and caution in the movement of its trains, and can not be charged with liability except in case of willful or wanton negligence. *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *L. S. & M. S. R. R. Co. v. Hart*, 87 Ill. 529; *Blanchard v. L. S. & M. S. R. R. Co.*, 126 Ill. 416; *I. C. R. R. Co. v. Noble*, 142 Ill. 578; *The Wabash R. R. Co. v. Jones*, 163 Ill. 167; *L. S. & M. S. R. R. Co. v. Clark*, 41 Ill. App. 343; *C., R. I. & P. R. R. Co. v. Bednorz*, 57 Ill. App. 309.

There are other cases in which it has been held that the place at which the person injured in passing over or upon the railroad tracks, though not a public street, yet was so far used by the public in crossing the tracks or yards of the railroad company as to show an invitation or assent by the company to such use, and in such case the rule as to trespassing has not been applied, but on the contrary the company has been held obligated to the exercise of care in the movement of its trains in relation to such passage-ways and the people using them. *P., Ft. W. & C. Ry. Co. v. Callaghan*, 157 Ill. 406; *C. & A. R. R. Co. v. O'Neil*, 172 Ill. 527; *C., B. & Q. R. R. Co. v. Murowski*, 179 Ill. 77; The same rule is adopted in other jurisdictions. *Swift v. S. I. R. T. R. R. Co.*, 123 N. Y. 645; *Taylor v. D. & H. C. Co.*, 113 Pa. St. 162; *Roth v. Union Depot Co.*, 43 Pac. Rep. 641.

The Supreme Courts of Maryland and Massachusetts repudiate this doctrine as applied by the New York court, and limit its application to an invitation, express or implied, by the company to use its property. *B. & O. R. R. Co. v. State*, 62 Md. 479; *Chenery v. Fitchburg R. R. Co.*, 160 Mass. 211.

The decisions in these cases are based upon a well defined distinction between mere passive license by failure to prevent use, which would leave the person using the property a bare licensee, and an express or implied invitation to use, which would create obligation and duty on the part of the owner thus inviting use. The Maryland case cites with approval and relies upon the Illinois case of *I. C. R. R. Co. v. Godfrey*, *supra*, and says:

“A right of way of a railroad company is the exclusive property of such company, upon which no unauthorized person has the right to be, and any one who travels upon such right of way, as a foot-way, and not for any business with the railroad, is a wrongdoer and trespasser; and the mere acquiescence of the railroad company in such user does not give the right to use it, or create any obligation for especial protection.”

We are inclined to think that these cases present the true rule, which is wholly in accord with the decision in the *Godfrey* case, so frequently cited by our Supreme Court with approval, and that this rule is not in substantial conflict with any of the later decisions of that court.

If the appellant, when injured, had been upon the team track in question, upon his way to or from the elevator, or had been using the passage-way for any business purpose, to which use he was invited by the company, we think that the doctrine announced would govern, and that a finding by a jury would then have been proper to the effect that the facts were such as to create a duty and obligation to exercise ordinary care upon the part of appellee in its relation to appellant. But the difficulty is in applying the rule of the *Murowski* case, and others, *supra*, to the facts of this case; that here appellant has shown by his own testimony that he was not using the passage-way to the elevator for

the purpose of any business at the elevator or with the railroad company. It is undisputed that appellant was crossing the railroad yard to reach the railroad bridge in order to get across the river, and for no other purpose. It is also clear that there was no path, team-track or other passage-way over the railroad tracks to the bridge. In so crossing the railroad tracks to reach the bridge, appellant was beyond any question a trespasser upon the yards used by appellee. But in the course of his progress he reached a train standing across his course, and because of this, or for some other reason, he turned out of his course toward the bridge, which was westerly, and proceeded in a northwesterly direction upon the passage-way toward the elevator. While upon the passage-way for this purpose only, he was injured. The question presented by these conditions is as to whether he was then a trespasser, as he was when proceeding across the tracks toward the bridge, or had become a licensee by invitation of the company merely because he had thus made such temporary use of the passage-way in his progress toward the railroad bridge. We think it clear upon principle that he was still a trespasser, and that the company owed him no duty. In the Murowski case it appeared that the passage-way upon which the plaintiff in that case was injured, although over the private property of the defendant company, had been devoted to the use of the public, or that the employes of an adjacent manufactory, and those who congregated at the factory for the purpose of securing employment, "had been licensed by the defendant company to pass over and be upon the property" where the injury was received. It also appeared that the plaintiff there at the time of the injury had gone upon the passage-way for the purpose of getting employment at the factory, and that he was standing upon the passage-way in front of the gate of the factory when struck by an engine and injured. The court held that under those circumstances it was a question of fact for a jury as to "whether the plaintiff was a trespasser or whether he was rightfully on defendant's property at the time he was injured."

If it appeared in the case under consideration that appellant at the time when he was injured was upon the private property of appellee, *i. e.*, these railroad yards, occupied by appellee's track, for the purpose of going to or from the elevator, then we would hold that under the rule announced in the Murowski case, the question as to whether he was a trespasser would be a question for the jury. For there is evidence in the record tending to show that the passage-way here in question was used by persons for access to the elevator by invitation of the appellee. But there is no evidence whatever that there was any passage-way at all from the western terminus of Twentieth street to the railroad bridge, or that any part of the public used the railroad yards for the purpose of reaching that bridge. It is undisputed that appellant was using the yards for a foot-path to reach the railroad bridge, and for that purpose only. Therefore we are led to conclude that the facts of this case bring it within the rule announced in *Blanchard v. L. S. & M. S. Ry. Co.*, *supra*. In that case the court said :

"It is clear that under the doctrine laid down by this court in *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500, and *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510, the deceased was a trespasser upon the right of way of the railroad company. He was walking along the railroad track, or trying to cross the tracks in a diagonal direction, at a point where there was no regular street crossing and where foot passengers could not properly go. He was not traveling upon any business connected with the railroad. * * * He was walking on the tracks, * * * using them for his own convenience in going to his home to get his dinner."

In the *Godfrey* case referred to the court said :

"The plaintiff was traveling upon defendant's right of way * * * for his own convenience. * * * There was nothing to exempt him from the character of a wrongdoer and trespasser in so doing, further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by individuals. But, because the company did not see fit to enforce its rights and keep people off its premises, no right of way over its ground was thereby acquired. * * * A mere naked license or permission to enter or pass over an estate will not create a

duty or impose an obligation on the part of the owner to provide against the danger of accident."

This announcement is cited with approval in the Hetherington case, the Blanchard case, and the Jones case, *supra*.

It follows that the further rule applies, as announced in *Wabash Co. v. Jones*, *supra*, wherein the court said :

"The doctrine announced in these decisions, that where the persons or animals exposed to injury are mere trespassers, the duty to exercise care arises only upon discovery of their presence on the railway, seems to be strictly in accordance with the general current of authority."

There remains to be considered the second point raised, viz., that it should have been left to the jury to determine if the negligence of the appellee was willful or wanton. But this case did not proceed upon any such theory. The appellant does not count upon such degree of negligence in his pleading, and the evidence does not prove or tend to prove it. There is no evidence that the servants of appellee were aware of the presence of appellant upon the track. There is no evidence that at the time of the injury there were any number of people about the yards and upon this passage-way, or that it was a time of the day when passage to or from the elevator was frequent. There is absolutely nothing in the evidence upon which wanton or willful negligence could be predicated, save the fact that the train was moved without ringing a bell or blowing a whistle, and hence in contravention of the requirement of the statute. We think that this was not of itself sufficient. In the *Blanchard case*, *supra*, the court said :

"The plaintiff in this case has not shown that the conduct of the defendant or its servants was wanton or willful. The proof tends to show that the engine was moving at a rate of speed greater than that permitted by the city ordinance. This circumstance might well have been considered by the jury in determining whether the defendant was guilty of such negligence as caused the death of the deceased, if the latter had been lawfully upon the track, or had been otherwise in the exercise of ordinary care. But in the *Hetherington case* the following language was used : 'While it is true the railroad company was running its train

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at a greater rate of speed than allowed by the ordinances of the city of Chicago, yet that fact did not relieve the deceased from the exercise of ordinary care, nor can the speed of the train alone be regarded as furnishing a sufficient reason for holding that the injury was willful or wanton.”

We are of opinion that if this case had been submitted to the jury, no verdict for the appellant could have been returned which would have been supported by evidence. The court, therefore, did not err in peremptorily directing a verdict for appellee.

The judgment is affirmed.

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1. **INJUNCTIONS—Without Notice.**—A statement of a conclusion, without any facts set forth to support such conclusion, is insufficient as a pleading upon which to order an injunction without notice.

Bill for an Injunction.—Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the October term, 1898. Reversed. Opinion filed January 18, 1900.

NEWMAN, NORTHRUP & LEVINSON, attorneys for appellant.

PECK, MILLER & STARR, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

This appeal is from an interlocutory order of injunction. The order was entered upon an *ex parte* hearing. The effect of the injunction was to restrain further proceeding in a garnishment suit, pending upon the law side of the same court. The only question presented upon the appeal is as to whether the showing made by bill of complaint, and affidavit accompanying the bill, is sufficient to warrant the issuing of the order without notice. The order is based upon no other showing than that made by bill of complaint

and affidavit verifying the same. The bill of complaint alleges in this behalf only the institution and pendency of the garnishment suit. It does not allege that the suit was likely to be reached for hearing or disposed of so speedily that a restraining order issued without notice was thereby rendered necessary. The affidavit accompanying the bill merely alleges, in general terms, that "the interests of complainant will be unduly prejudiced if the injunction prayed for in said bill is not issued immediately without notice to said defendants." No facts are set forth by the bill of complaint or by the affidavit, from which the court could adjudge as to the necessity of such summary action. It has been held many times by this court that such a statement of conclusion, without any facts set forth to support the conclusion, is insufficient. Among other decisions so holding are those in *Becker v. Defenbaugh*, 66 Ill. App. 504; *Suburban Construction Co. v. Naugle*, 70 Ill. App. 384; *Chicago City Ry. Co. v. Gen. Electric Co.*, 74 Ill. App. 465.

The garnishment suit, proceeding in which is enjoined, is pending in the same court from which the order of injunction was sought. It is difficult to perceive how there could possibly result any prejudice to the complainant by the giving of notice of the application for the injunction. Presumably no step of procedure could be taken in the garnishment suit without notice to the complainant here. The possibility of such prejudice, to say nothing of the likelihood thereof, is not disclosed. The order is therefore reversed.

William H. Heegaard v. S. F. Hess & Co.

1. **INTEREST**—*On Invoices*.—At the head of each invoice of goods sent by the vendor to the vendee were printed the words: "Bills bear interest after maturity, and are subject to sight draft." Also the following: "Terms 60 days, 2 per cent discount for cash within 10 days." Held, not error to allow interest in this case from the date of the last invoice.

Heegaard v. S. F. Hess & Co.

2. **PRINCIPAL AND AGENT**—*Authority to Bind Not Enlarged, When.*—The consideration or inducement which moves an agent to undertake to bind his principal does not enlarge the authority to bind. (Hess & Co. v. Heegaard, 54 Ill. App. 327.)

Assumpsit, for goods sold. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1899. Affirmed. Opinion filed January 18, 1900.

ASHCRAFT & GORDON, attorneys for appellant; R. M. ASHCRAFT of counsel.

DARROW, THOMAS & THOMPSON, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

The opening words of the printed argument of counsel for appellant are that "This case is before this court on substantially the same evidence as was in the record in Hess & Co. v. Heegaard, 54 Ill. App. 227." It is also stated in said argument that "The chief question involved is whether or not the appellee is bound by the contracts made by J. E. Avery."

Said contracts are the same ones that were before the court upon the former appeal in this case, cited above. It was there held that appellee is not bound by said contracts. We are not disposed to reconsider the questions there considered and decided.

Appellant sought to show that "it is the custom to deal with manufacturers' agents in Chicago precisely as if they were the principals." Such testimony was offered for the purpose of thus showing that said Avery was authorized as agent of appellee to execute the contract in question. There was no error in excluding such testimony. Even if it be held that the scope and extent of an agent's authority to bind his principal by special contract could be thus established (we do not wish to be understood as so holding) it appears that appellant did not rely upon such a custom.

The appellee's place of business was Rochester, N. Y.

Appellant testified that he had negotiations with said Avery in regard to a rebate, but the matter "run along" and no contract was made. Later appellant said to Mr. Avery that he could not order cigarettes from appellee unless he could get the rebate, but would do so if he could have a contract to that effect. Avery replied that he was going to Rochester. Appellant then said, "If you find that you can make that agreement you can ship me the cigarettes." Upon the return of said Avery from Rochester he said to appellant that "it was all right, and he would make a contract for the rebate," which was afterward done.

Clearly appellant was not relying upon any custom, but relied upon the statement of said Avery as to his (Avery's) authority.

In the judgment now appealed from is included interest. On behalf of appellant it is contended that as this suit is upon an open account it was error to allow interest.

At the head of each invoice sent by appellee to appellant was printed the words: "Bills bear interest after maturity, and are subject to sight draft." Also the following: "Terms 60 days, 2 per cent discount for cash within 10 days." The date of the last bill was August 26, 1890. Interest at the rate of 5 per cent was allowed to appellee from October 26, 1890.

Counsel for appellant make no argument, cite no authorities, state no reason, why it was error to allow interest. They merely refer to the section of the statute relating to interest. We do not, therefore, feel called upon to enter into any discussion of the point thus stated, or to refer to authorities. The point is not well taken. It was not error to allow interest under the facts of this case.

The judgment of the Circuit Court is affirmed.

Civil Service Commission v. H. L. Kenyon.

1. **CIVIL SERVICE COMMISSION—*Authority, etc.***—The civil service commission of the city of Chicago is not authorized to direct that a person named shall be employed in any particular place designated by the commission. Neither has such commission any power or authority to say whether an employe is needed to perform any designated service.

2. **SAME—*Statutory Provisions.***—The statute provides that the head of the department or office in which a classified position is to be filled shall notify such commission of the fact, and the commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register of the class or grade to which said position belongs, and no such employe shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense.

3. **MANDAMUS—*To Compel the Commission to Act.***—An order directing that a mandamus issue to compel the civil service commission to place a discharged person in a position, as a mechanical engineer of the Chicago avenue water works, is erroneous.

4. **SAME—*As Against Public Officers.***—A court should not assume to direct public officials to perform acts which they are not authorized to perform.

Mandamus.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed. Opinion filed January 16, 1900.

CHARLES M. WALKER, corporation counsel, and GRANVILLE W. BROWNING, first assistant, attorneys for appellant.

ERNEST SAUNDERS, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

Appellee was in the employ of the city of Chicago as an assistant engineer at the Chicago avenue pumping station. He was discharged for alleged misconduct in habitually sleeping while on duty. He commenced this proceeding by filing a petition for a mandamus against the "Civil Service Commission of the City of Chicago." The prayer of said

petition is that said commission be commanded "forthwith to place petitioner in the position of the fifth grade mechanical engineer of the Chicago avenue water works * * * and to certify petitioner to such position."

Appellee had been examined by said commission and had received a certificate as fifth grade mechanical engineer. Upon a hearing of the case the trial court entered an order directing that a writ of mandamus issue commanding said commissioner "to certify the said petitioner to the position of assistant engineer at the Chicago avenue pumping station" forthwith. It is from that order that this appeal is prosecuted.

The civil service commission of this city is not authorized to direct that a person named shall be employed in any particular place designated by the commission. Neither has such commission any power or authority to say whether an employe is needed to perform any designated service. The statute provides that "the head of the department or office in which a position classified under this act is to be filled shall notify said commission of that fact, and said commission shall certify to the appointing officer the name and address of the candidate standing highest upon the register for the class or grade to which said position belongs." Also, that no such employe "shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense." Such charges are to be investigated by or under the direction of said commission.

This provision of the statute that an employe shall not be removed or discharged except for cause, etc., applies to the head of the department or office where he is employed. The commission has performed its full duty to such employe when it has examined him and given the proper certificate as to his qualifications. After that it has no control over him, and no duty unless or until written charges shall be preferred. The commission has no power to put him in any particular place of employment or to reinstate him if discharged. Whatever remedy appellee

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may have by reason of his discharge, he has none against said commission. His certificate has not been revoked. No written charges have been preferred against him. The commission has no authority to reinstate him. It has not now and never had any authority "to certify the petitioner to the position of assistant engineer at the Chicago avenue pumping works," as it is commanded to do by said order.

It follows that the order directing that a mandamus issue was erroneous. A court should not assume to direct public officials to perform acts which they are not and never were authorized to perform.

Said order of the Superior Court directing that a mandamus issue is reversed. But as no proceeding can be sustained against said commission in the matter therein presented, the cause is not remanded. Reversed.

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John Frederick Kehm, survivor of John Frederick Kehm and Emma M. Kehm, v. Thomas Mott et al.

1. **RECEIVERS—When a Defendant May be Appointed.**—A defendant in a foreclosure proceeding, when it appears that he has no interest unfriendly or inimical to the parties, and where it is stipulated, in the trust deed being foreclosed, that he may be appointed receiver, may properly be appointed receiver by the court.

2. **SAME—Presumption as to Appointment—Notice.**—Where the record does not disclose that a receiver was appointed without notice, the court will presume, in the absence of such showing, that the court proceeded regularly and upon due notice.

3. **SAME—Appointment Without Notice—Estoppel to Question.**—A party can not raise in the Appellate Court for the first time the question of the appointment of a receiver without notice, when he has assented to the appointment of the receiver by calling upon the court below to require it to take action as to such receiver, and has had a hearing before the master and the court, after he was served with process and has been accorded every benefit that he could have received by notice in the first instance.

4. **EQUITY PRACTICE—Subsequent Incumbrances.**—Where a bill to foreclose a trust deed alleges that certain defendants have or claim to have some interest in or lien upon the premises conveyed by the deed

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of trust, but that such interest or lien was acquired subsequent to said deed of trust, and is subject to the lien thereof, if the defendants have any interest different from such allegations it is incumbent upon them to allege and prove the same.

Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

Statement by the Court.—August 8, 1898, Thomas Mott, being the owner of a note of \$8,000, made by one Ostrom, dated June 16, 1893, payable five years after date to the order of said Mott, with interest at six per cent per annum, payable half yearly, and seven per cent per annum after maturity, secured by a trust deed of the same date to Horace E. Hurlburt, trustee, as party of the second part, conveying lot 2 in Ostrom's subdivision in Chicago, Illinois (fully described in the bill), and also the rents, issues and profits thereof, filed his bill to foreclose the same for default in payment of the principal. The bill alleged that Ostrom was insolvent and that the property was meagre and scant security, and asks for the appointment of a receiver.

Among other defendants to said bill were John Frederick Kehm and Emma M. Kehm, and the bill alleges that these defendants above mentioned "have or claim to have some interest in or lien upon said premises conveyed by said deed of trust, but such interest or lien, if any they or any of them have, was acquired long subsequent to the time when said deed of trust became a lien upon said premises, and is subject, subordinate and inferior to the lien thereof upon said premises and to the rights of orator as respects said premises as herein set forth;" also, that "on the 29th day of December, 1897, there was filed for record in the recorder's office of said Cook county, and recorded therein in book 6154 of records, on page 509, a duplicate of a certificate of sale, dated December 27, 1897, made by William Fenimore Cooper, a master in chancery of the Circuit Court of Cook County, to John Frederick Kehm and Emma M. Kehm, certifying that on the 27th day of December, 1897, said master in chancery sold said lot 2 in Ostrom's subdivision to John Frederick Kehm and Emma M.

Kehm for \$1,241;" also, that it is provided in said trust deed that "upon the filing of any bill for the foreclosure of said deed of trust, said trustee, or some other proper person, shall be appointed receiver of said premises, and in the event of a foreclosure of, or of proceedings to foreclose said deed of trust, said grantor therein, his heirs and assigns, shall pay all costs and expenses of the foreclosure proceedings, and as a part of such expenses there shall be embraced for a solicitor's fee an amount of money equal to five per centum of the indebtedness secured by said deed of trust unpaid, and the same shall be included in the decree of foreclosure and made a part thereof, and be a lien upon said premises;" also, that said trust deed contains the following provision:

"That in case of the death, removal or absence, either permanently or for the time being, from the said county of Cook, or inability or refusal to act hereunder, of the said party of the second part, or any time when action under the powers and trust herein contained may be required, then James E. Munroe, of the said city of Chicago, shall be, and he hereby is, named, designated and made successor in trust to said party of the second part, under this deed, with like power and authority to do, act and perform as if he were named herein as a party of the second part hereto, and said premises and every part thereof which shall then remain unsold or not reconveyed, shall become vested in said successor in trust for the uses and purposes aforesaid."

The bill is verified under oath of complainant's solicitor in the usual form. Emil R. Haase was, on August 19, 1898, appointed receiver, and qualified August 24, 1898, but whether upon notice to defendants or not does not appear.

The said Kehms filed their answer October 31, 1898, by which they deny each and all of the allegations of the complainant's bill, and call for strict proof of the same.

The cause was referred to a master to take proof and report his conclusions. The master reported, finding that all the material allegations in the bill, and as above herein stated, were proven; that there was due upon said principal note, and secured by said trust deed, the total sum of \$8,623.76, including the sum of \$350 for complainant's solicitor's fees, which latter sum the master found was a rea-

sonable, the usual and customary charge for the service rendered and to be rendered by the complainant's solicitors in said cause. The evidence heard before the master and reported by him sustains the findings of the report.

Upon a hearing of exceptions by the said Kehms to the master's report, it was confirmed and a decree entered for the foreclosure of said trust deed, and Emil R. Haase, the receiver theretofore appointed by the court, was by said decree continued in office as such receiver until the further order of the court. The decree also provides that on failure to redeem, all the defendants should be forever barred and foreclosed of all right and equity of redemption in and to said real estate, and that the grantee in the master's deed which should be made, in case of a sale and failure to redeem, should be let into possession of said real estate, upon demand therefor, and on refusal to comply with such demand that a writ of assistance should issue to compel the surrender of said real estate.

The evidence before the master shows, among other things, that the James E. Munroe named in said trust deed as successor in trust, is the same person who was complainant's solicitor in the Circuit Court in this case, but that he never accepted the appointment of successor in trust, nor acted as such, and that Hurlbut, the trustee, was absent from the county of Cook, and was in the State of Michigan, in July or August of the year 1898, but what time during those months he was so absent from Cook county does not appear from the evidence. He was served with a summons in the case by the deputy sheriff of Cook county, Illinois, by delivering a copy thereof to him on August 18, 1898.

JAMES A. PETERSON, attorney for appellants.

JAMES E. MUNROE, attorney for Thomas Mott, one of the appellees.

MR. JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

It is claimed by appellants that it was error to appoint

Emil R. Haase receiver, because he was a defendant. This contention, we think, is answered by the fact that it is stipulated in the trust deed being foreclosed that he might be appointed receiver; by the further fact that it does not appear from this record that he has any interest whatever unfriendly or inimical to appellants; and for the further reason that under the answer of appellants they deny that they have any interest in the premises. *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399, and cases there cited.

It is also claimed that it was error to appoint a receiver without notice. The record does not disclose that the receiver was appointed without notice, and we must presume, in the absence of such showing, that the court proceeded regularly and upon due notice. Moreover, appellants can not now urge error in this regard, because the record shows that they assented to the appointment of the receiver by calling upon the court to require him to take action as such receiver, and also because they had a hearing before the master and the court after they were served with process, and thus were accorded every benefit which they could have received by notice in the first instance. *Iroquois Furnace Co. case, supra*.

It is further claimed that the court erred in settling by its decree, as it is claimed it did, adverse titles, in that the decree bars all equity of redemption of appellants in said premises, in case of a sale and failure to redeem therefrom, and provides for a writ of assistance to place the grantee in the master's deed issued after such failure to redeem and demand of possession by him and a refusal to comply with such demand. *Gage v. Perry*, 93 Ill. 176, and other similar cases are cited by appellants as sustaining this contention. The difficulty, however, is not with the law as announced in these cases, but the application of it to the case at bar. As we have seen, the bill alleges that the appellants have, or claim to have, some interest or lien upon the premises in question. This allegation is squarely denied by appellants' answer, and their answer does not set up what interest, if any, they have in the premises. There is no proof in the

record to show that appellants have any interest. Complainant was not obliged to prove that they had an interest, claim or lien upon the premises when appellants denied the allegation in that regard by their answer. Moreover, as we have seen, the bill alleges that if appellants had any interest or lien, it was subject, subordinate and inferior to the lien of complainant. If appellants had any claim or interest in this real estate, in view of the allegations of the bill above stated, it was incumbent upon them to allege and prove the same. 2 Jones on Mortgages, Secs. 1473-4; *Sichler v. Look*, 93 Cal. 608; *Hoes v. Boyer*, 108 Ind. 494; *Drury v. Clark*, 16 How. Pr. 430; *Montague County v. Meadows* (Tex.), 42 S. W. Rep. 326; *Thompson v. Morris*, 57 Ill. 333-8; *Finch v. Martin*, 19 Ill. 105-12.

Even if it could be said the fact that appellants had a master's certificate of purchase of the real estate showed an interest in appellants, it does not appear what it was, or that it was in any way adverse to the lien of appellees. It appears from the record that this certificate was in the possession of appellants' solicitor. He did not produce it, and it will therefore be presumed, as against appellants, that the proof it might afford would not be favorable to them.

Lastly, it is contended that it was error to allow complainant \$350 solicitor's fees, because his solicitor in the Circuit Court was also successor in trust. This claim is, in our opinion, fully answered by the fact, which appears from the evidence, that Mr. Munroe never accepted the appointment of successor in trust under the trust deed, and never acted as such. *Gray v. Robinson*, 174 Ill. 242, is not in point. In that case the trustee in the trust deed was a co-complainant in the case, accepted his appointment as trustee, and in that capacity, of his own volition, became a party complainant in the proceeding.

The decree of the Circuit Court is affirmed.

Thomas McMurray v. Bertha Thede.

1. *JURISDICTION—Entry of Appearance—Appeals from Justices.*—When a defendant enters his appearance it does not matter whether there has been any summons in the case or not. The object of the summons is to bring the party into court, and when he appears the purpose of the service of summons has been accomplished.

2. *SAME—Appeals from Justices—Co-defendants.*—It is not necessary, in order to give the court jurisdiction over a co-defendant, on appeal from a justice, that his appearance should be entered ten days before the first day of the term. The appearance of the appellee is required to be so entered in order to permit the case to stand for trial at such term.

Attachment.—Appeal from the County Court of Cook County; the Hon. D. L. JONES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

E. M. STANNARD, attorney for appellant.

OTIS WESNER, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Judgment was obtained by appellee before a justice of the peace against one Henry Thede and appellant, from which judgment the latter perfected an appeal to the County Court of Cook County, and during the November term filed his appeal bond, as required by statute. Subsequently, during the December term, appellee filed her written appearance in said cause, more than ten days before the first day of the next or January term. The other party, against whom, jointly with appellant, judgment had been rendered by the justice, did not join in the appeal, and it does not appear that he was summoned. He, however, entered his appearance in writing during the January term, but this does not appear to have been done until the day upon which the case came on for trial.

It is said that because said co-defendant does not appear to have been summoned or to have entered his appearance

ten days before the January term, the County Court had no jurisdiction to try the case as to him. The co-defendant himself is not complaining of the judgment to which he is a party.

Where, however, a defendant enters his appearance it does not matter whether there has been any process in the case or not. The object of the summons is to bring the party into court; and, when he appears, the purpose of the service of summons has been accomplished. *Wasson v. Cone*, 86 Ill. 46 (47). It was not necessary, in order to give the court jurisdiction over the co-defendant, that his appearance should have been entered ten days before the first day of the term. The appellee's appearance is required to be so entered in the County Court ten days before the first day of the term, in order to permit the case to stand for trial at that term, but not so with co-defendants of the party appealing. In *Walter v. Bierman*, 59 Ill. 186, cited by appellant's counsel, not only had no summons issued against the co-defendant, but it is expressly stated that his appearance had not been entered, and it was clear that the Circuit Court had no jurisdiction over him. So also in *Bourton v. Rathbone*, 23 Ill. App. 654.

It is said that the appearance of the co-defendant was entered without payment of the appearance fee, as required by statute, and that it was not therefore entitled to be entered. We can not consider the objection. There is an affidavit in the record, sworn to and filed nine days after the date of filing the appeal bond, which states that "at the time" of filing such appearance, the "said defendant" did not pay any appearance fee. This affidavit is apparently carefully worded not to deny that the appearance fee was actually paid. But it has no proper place in this record. There are abundant reasons why it can not be considered. It is enough to say that the objections urged here do not appear to have been raised in the trial court, and are not preserved by bill of exceptions.

A motion to dismiss the appeal is before us but will not require consideration. The judgment of the County Court will be affirmed.

Maurice Rosenfeld and Peter Van Vlissingen v. Minnie J. De Witt, James Turnock and George C. Corning.

1. RECORDS—*Evidence of Damages—Dissolution of Injunctions.*—A failure to show in the record, the evidence upon which an allowance of damages is made upon the dissolution of an injunction, is fatal.

Bill for an Injunction.—Error to the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 16, 1900.

WILLIAM W. CASE, attorney for plaintiffs in error.

JAMES TURNOCK, attorney for defendants in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Upon the dissolution of an injunction granted upon a bill filed by the plaintiff in error Van Vlissingen, against the defendants in error, an assessment of damages upon suggestions therefor was had, and judgment for fifty dollars solicitor's fees as and for damages sustained, was given against Van Vlissingen and his surety upon the injunction bond, both of whom have joined in this writ of error.

The only damages claimed were for solicitor's fees. Although the order upon the assessment of damages shows that evidence was heard, the record nowhere shows what the evidence was.

A failure to show in the record the evidence upon which an allowance of damages is made upon the dissolution of an injunction is fatal, and a decree awarding damages must be reversed for the error. *Steele v. Boone*, 75 Ill. 457; *Howard v. Austin*, 12 Ill. App. 655.

Other errors are assigned and argued, but one error well assigned is enough.

The decree is reversed and the cause remanded.

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Michael C. McDonald et al. v. The People, etc.

1. CONTEMPT—*What is Not a Sufficient Ground to Purge.*—Where a party has knowledge of the command of the court, and acts in disregard of it and by way of obstructing its enforcement, the fact that another, an officer of the court, contemplated a like disregard, will not be a sufficient ground to purge him of contempt.

2. SAME—*Sufficiency of Orders Imposing Fines, etc.*—An order imposing a fine and imprisonment for contempt of court must designate some one to whom such fine should be paid, and the time of imprisonment should be limited by the provision, "or until discharged according to law."

Proceedings for Contempt.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1899. Reversed. Opinion filed January 18, 1900.

Statement.—This is an appeal from an order which finds appellants guilty of a contempt of the court and imposes a fine upon each of appellants as punishment therefor. The act held to be a contempt was the obtaining of a writ of replevin and the securing of a seizure of property thereunder after the court had, in the proceeding here involved, ordered such property to be taken possession of and sold by an officer of the court, viz., a master in chancery. The answer of the appellants to a rule upon them to show cause sets up, as an excuse for thus interfering with the process of the court, that they had been informed by the master in chancery that he did not intend to obey the direction of the court, and that he would decline to take possession of the property as ordered by the court. It appears that appellants had knowledge of the order of the court directing the master to take possession of the property when they sued out the writ of replevin and directed the levy upon this property.

The order appealed from is in part as follows :

"Wherefore it is ordered, adjudged and decreed, that in their acts and doings aforesaid, the said Michael C. McDonald,

McDonald v. The People.

James Bowlan and Edward Maher were and are, and each of them was and is in contempt of this court, and each of them was and is guilty of obstructing the lawful process thereof; and it is further ordered, adjudged and decreed, that the said Michael C. McDonald, James Bowlan and Edward Maher be each fined the sum of \$250, and to stand committed to the county jail of Cook county until the same shall be paid."

A. B. JENKS and EDWARD MAHER, attorneys for appellants.

L. A. GILMORE and FRANK P. BLAIR, attorneys for appellee.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

It is urged by counsel for appellants that their answer to the rule to show cause, presents a sufficient ground to purge them from any contempt. It is contended in effect that, although they were aware of the order of the court directing its master in chancery to take possession of the property in question, yet, because that officer had informed them that he would not obey the court in this behalf and would decline to take possession of the property, therefore they also were warranted in disregarding the court's order, and in seizing the property in despite of the same. The position is not tenable. Appellants, having actual knowledge of the command of the court as to this property, acted in disregard of it, and by way of obstructing its enforcement; and that another, an officer of the court, contemplated a like disregard, would not, if true, avail them anything.

There are several grounds of objection to the form of the order. First, it is contended that the order is faulty in that it fails to designate any one to whom the fines shall be paid. Secondly, that the order is faulty in that it fails to fix a limitation of the imprisonment by the qualification "or until discharged according to law," or words of like effect. And, thirdly, it is contended that the order is erro-

neous in that it in effect orders the imprisonment of each appellant until the fines imposed upon all shall be paid.

We are of opinion that each contention is of some force.

The order, to have been proper in form, should have designated some one to whom the fines should be paid. *Smith v. Tenney*, 62 Ill. App. 571; *The Albany City Bank v. Schermerhorn*, 9 Paige, 372.

In each of these cases the order was coercive in its nature and to enforce the performance of some act, while in this case the order is solely by way of punishment for an act done. In the New York case the fine discussed was one which might have been ordered paid to any one of several in private or public interest. But in the case of any order, requiring the payment of a fine and imposing imprisonment in default of payment, the order should be definite and clear in all of its terms, that it may be understood precisely what the party committed must do to procure his discharge. It is therefore proper that the order should designate the one to whom payment of the fine may be made.

The time of imprisonment should have been limited by the further provision, "or until discharged according to law," or by words of like effect. *Billingslee v. The People*, No. 8483, decided at this term and not yet reported.

The order is faulty in each of these particulars. But it is unnecessary to decide whether either of them would of itself afford sufficient ground for reversing this order, since we are of opinion that the third ground of objection makes such a reversal necessary.

The order in effect provides that the imprisonment of the appellants shall continue until the fines are paid. It is a joint order in this respect, not a separate order as to payment by each respondent of his individual fine as a condition of his discharge. Under such provision the imprisonment of each appellant might continue not only until his own fine, but as well until his co-respondents' fines, were fully paid. An order which so provides, or which is so far ambiguous as to be capable of such construction, can not be sustained.

Kee v. Cahill.

We are of opinion that the terms of this order are such as make it erroneous in this respect. By reason of this conclusion, it is unnecessary to consider other questions raised. The order is reversed.

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James W. Kee and Joseph M. Omo v. Daniel Cahill.

1. **QUESTIONS OF FACT—*Province of the Jury.***—It is within the province of the jury to determine questions of fact.

2. **STATUTE OF FRAUDS—*The General Rule.***—The general rule as to the statute of frauds is that if the promise is in the nature of an original undertaking to pay a debt to a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the provision of the statute and need not be in writing to make it valid and binding; it will be regarded in the light of a contract for the benefit of a third party, upon which such third party may found an action for the breach. Such a promise is not within the statute of frauds, and need not be necessarily in writing to make it valid.

Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

JESSE A. and HENRY R. BALDWIN, attorneys for appellant James W. Kee.

WILLIAM J. CANDLISH, attorney for appellant Joseph D. Omo.

JAMES S. HARLAN, attorney for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

In 1892 James Cahill was indebted to appellee, his brother, in the sum of \$5,500, secured by chattel mortgage upon a restaurant in this city. Said James Cahill and Florian S. Young entered into partnership for the purpose of conducting the business at said restaurant under the firm name of Cahill & Young. James Cahill sold to said Young

one-half interest in said restaurant, subject to said mortgage. Cahill and Young desired to have the mortgage held by appellee released, and, in consideration of said debt or of such release, they paid to appellee \$500 in cash, and gave to him two firm notes for the balance due him, one for \$2,000 and one for \$3,000, and he released said mortgage. The firm of Cahill & Young expended between \$20,000 and \$30,000 in improving and furnishing said restaurant, and became financially embarrassed. Appellants were creditors of the firm. An agreement was then made between said firm and appellants, whereby said firm sold to appellants said restaurant with the stock and fixtures, for the agreed price of \$25,000 and gave to appellants a bill of sale therefor.

On behalf of appellee it is contended that as a part of the consideration for said sale to appellants they promised and agreed to and with said firm to pay the amount due to appellee upon said notes of said firm, held by him. Appellee brought this suit to recover from appellants the amount due to him upon said notes. He bases his right to so recover upon said alleged promise by said appellants to pay the amount thus due to him. On behalf of appellants it is contended that they did not so promise and agree. All contested questions of fact are practically merged in the issue thus presented.

It is conceded on the part of appellee that such alleged promise was verbal; was not in writing. On behalf of appellants it is contended that such promise, if made, is within the statute of frauds, and therefore void. Thus the principal issue of law in this case is presented.

There is evidence tending to show that the promise was made by appellants as contended by appellee. There is also evidence tending to show that appellants did not make such promise. There is a sharp conflict in the testimony upon this point. It can not be reconciled. Some of the witnesses are mistaken in their statements. It is peculiarly within the province of the jury to determine the question of fact thus presented and supported.

Counsel for appellants complain bitterly of the rulings of

the court at the trial. They have reviewed the testimony and the rulings as to the same, and the remarks of the trial judge, in detail and at great length. We are, however, of opinion that taking the bill of exceptions as a whole, no reversible error appears in the rulings and remarks of the court. The jury found the issues in favor of appellee and assessed his damages at the full sum due upon said notes. That finding, based upon the conflicting evidence in the case, we must consider as settling the questions of fact involved.

The court, at the instance of the appellee, gave to the jury the following instruction, viz.:

"1. The jury is instructed, as a matter of law, that a promise made upon a valuable consideration, from one person to another, to pay a sum of money to a third person, is valid and binding, and can be enforced by said third person in his own name. In this case, if the jury believe from the evidence that the defendants, as charged in the declaration, purchased the leasehold and personal property in the restaurant from Cahill & Young, and as a part of the purchase price, agreed and undertook to pay the indebtedness due to Daniel Cahill from the firm of Cahill & Young, then the jury must find the issues for the plaintiff for the sum remaining unpaid or due at the time of making said agreement, and the interest upon it at the rate of five per cent."

The court refused to give to the jury the fifth instruction asked by appellants, which is as follows, viz.:

"5. The jury are instructed that if you believe from the evidence that the indebtedness alleged to be due to the plaintiff is primarily due him from a person or persons other than the defendants; and if you further find, from all the evidence in this case, that the defendants promised to pay such alleged indebtedness to the plaintiff; and if you further find from the evidence that such promise, if any, on the part of the defendants, was collateral only to the main or original undertaking, and was not accepted by the plaintiff in the place of said original undertaking; then, unless you further find from the evidence that such agreement, if any, or some memorandum or note thereof, was in writing and signed by said defendants, your verdict must be for the defendants."

By the giving of one and the refusal of the other of said instructions the question of the statute of frauds is pre-

sented, which is considered by counsel in their printed arguments.

The case of *Wilson v. Bevans*, 58 Ill. 232, as to the question of the statute of frauds and in the controlling facts, is precisely like the case at bar. As there stated:

"The appellant received the property contracted for, and it is wholly immaterial to him what direction was given to the purchase money. The vendor contracted to have it paid to his creditors instead of himself, and it imposes no hardship upon the purchaser. It was his contract so to pay the purchase money, and such a contract is valid and binding in law, although it is not evidenced by any writing."

Under the facts as found by the jury this language is directly in point and is controlling.

The Supreme Court in that case also states the general rule as to the statute of frauds in this State very clearly, in these words:

"The general rule is that if the promise is in the nature of an original undertaking to pay a debt to a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the provision of the statute, and need not be in writing to make it valid and binding; it will be regarded in the light of a contract for the benefit of a third party, upon which said third party may found an action for the breach. The authorities all seem to agree in holding that such promise is not within the statute of frauds, and need not necessarily be in writing to make it valid."

The *Bevans* case is cited with approval, as to this general rule, in *Meyer v. Hartman*, 72 Ill. 444, and *Borchsenius v. Canutson*, 100 Ill. 82, 92. It is also cited and is followed in *Mathers v. Carter*, 7 Ill. App. 225, and *Cornell v. Central Electric Co.*, 61 Ill. App. 325.

The notes made and given by Cahill & Young to appellee remained in the hands of appellee up to the time this suit was tried. It is contended by counsel for appellants that if the relation of debtor and creditor remained, as between the original parties, after the promise of a third party to pay the debt, the same as it did before, then the promise of such third party is within the statute of frauds and can not be

enforced unless in writing. The case of *Spear v. Farmers & Mech. Bk.*, 156 Ill. 155, is cited by appellants' counsel as being conclusive upon this point. We do not so understand the opinion of the Supreme Court. The promisor sued in that case "gave up and yielded no right he had," and received no consideration for his promise. True, the court says that "There was no change in the original indebtedness, the original debtors remaining liable to the original creditors precisely the same as when the indebtedness was originally contracted." But we do not understand the court to say, or intend to convey the impression, that because the original indebtedness remained unchanged, that therefore, and for that reason, the promise sued upon was collateral and void under the statute of frauds. Had there been a surrender or cancellation of such original indebtedness, that might, perhaps, have been a sufficient consideration. In the *Bevans* case, and in each of the cases cited above in support of the same point, the original indebtedness remained the same as before the promise by the third party. Had the Supreme Court intended to overrule all of those cases, and others to the same effect, it would have been by a more definite statement than any made in the *Spear* case. We do not think that the case of *Eddy v. Roberts*, 17 Ill. 505, states a different rule. But if it does, it must be considered as overruled by the *Bevans* case, and other cases above cited. Neither can it be considered that the court, in the case of *Murto v. McKnight*, 28 Ill. App. 238, also cited and specially relied upon by counsel for appellants, understood the *Eddy* case as stating any different rule from that so clearly stated in the *Bevans* case, because the court in the *Murto* case cites the other two cases together (p. 246) as sustaining the same point.

It is not deemed necessary to here consider all of the many points and objections made by counsel for appellants in their one hundred and thirteen pages of brief and argument, although we have examined each and all of them. Neither are we disposed to here enter into any review of the

numerous complaints made by counsel for appellants as to the trial judge personally. Upon a full examination of this case we are satisfied that substantial justice has been attained, and that no reversible error appears.

The judgment of the Circuit Court is affirmed.

**Charles H. Requa et al., Ex'rs; etc., v. Alice M. Graham,
Adm'r, etc.**

1. **ANNUITIES**—*When Subject to the Debts of the Beneficiary.*—Where an annuity is to be deposited in a bank quarterly, to the credit of the beneficiary, subject to his order, and is a provision by the testator made in lieu of his rights and interests under our statute in the estate of his wife, it is subject to his debts.

2. **STATUTES**—*How Construed When Taken from Other States.*—Where a statute is taken from the statutes of another State, upon the same subject, and which has been construed by the courts of such State, the courts of this State will be governed by the decisions of such courts.

Creditor's Bill.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 18, 1900.

Statement by the Court.—This is a creditor's bill by appellee, administratrix of the estate of James E. Graham, deceased, against appellants and John F. Nichols, to subject an annuity given to the latter by the will of Annie Elizabeth Nichols, wife of said John F. Nichols, to the payment of a judgment rendered against him January 24, 1878, in the Circuit Court of Cook County, for \$4,436.13 and costs, which was revived at the December, 1891, term of said court and an execution issued thereon September 27, 1897, which was returned December 20, 1897, "no property found and no part satisfied."

The will of Annie Elizabeth Nichols, which was proven and admitted to record in the Probate Court of Cook County, Illinois, on the 10th day of February, 1897, among other devises and bequests, bequeaths to her husband, John Field Nichols :

Requa v. Graham.

"The annual sum of eighteen hundred dollars during his natural life, to be paid quarterly in equal installments of four hundred and fifty dollars each, and deposited to his credit in the Merchants' Loan & Trust Co. Bank, or some other Chicago bank, subject to his order, which annuity shall be in lieu of any and all other interest in my estate to which he would be entitled."

The will also makes devises of real estate to different parties and gifts of numerous items of personal property to different legatees. By a codicil dated June 16, 1892, attached to said will, and proven and admitted to record at the same time, it was stated as follows:

"I have already advanced to my said husband and expended for his use so large an amount, and the probable net income of my estate will be so small, that I do not deem it just to burden my daughters (naming them) with so large an annuity for his benefit as is provided for in said will, and I hereby direct that a yearly or annual sum of twelve hundred dollars shall be paid to him in the same manner in said will provided for, which provision shall be in place and lieu of all estate, claim, right and provision to which he is or may or would otherwise be entitled either by virtue of the law of the land or under the provisions for his benefit contained in my said will."

John F. Nichols filed no renunciation of the terms of said will.

The inventory of the estate of the said Annie Elizabeth Nichols, which was approved by said Probate Court, shows real estate of the value \$37,500, and personal property of the value of \$33,592.67, which came to the hands of appellants as executors under said will.

Besides all the matters above stated, the master to whom said cause was referred to take proof and report his conclusions thereon, found, and the evidence sustains the findings, that John F. Nichols is seventy years of age, is infirm in health, and is now residing in Seattle; that he has no property or business, and is physically incapable of following any occupation for a livelihood, and that he has an invalid daughter, to whose support he contributes to the extent of his ability; that said annuity is a provision given by said testatrix out of her separate estate for the support and mainte-

nance of said Nichols during his natural life, and that the whole of said annuity has been and is expended by him for his support and maintenance, and is only sufficient to support and maintain him in the manner of living to which he is and has been accustomed; that said Nichols is lacking in business capacity, and said testatrix had taken her affairs out of his hands prior to her death: that \$600 has been paid Nichols since the beginning of this suit, one-half of which was paid after the service of process upon appellants.

On a hearing before the court, on exceptions to the master's report, said John F. Nichols having been defaulted and the bill taken as confessed by him, the report was confirmed, and the court, after finding the matters hereinabove stated, and that since the commencement of this suit and service on appellants there has become due \$1,200 on said annuity, and there was due from said John F. Nichols to the complainant upon said judgment \$4,447.63, with interest at six per cent per annum to July 1, 1897, and five per cent thereafter until paid, decreed that said appellants, as executors, pay to the solicitors for complainant, within thirty days, the sum of \$1,200, the installments of said annuity then due, and that said appellants pay to said solicitors, "from the assets of said estate of Annie Elizabeth Nichols, all installments of said annuity as they hereafter severally become due, until said judgment and interest thereon is fully paid, and that said executors pay the costs of this suit."

WALKER & PAYNE and PARTRIDGE & PARTRIDGE, attorneys for appellants.

B. W. ELLIS & SON, attorneys for appellee.

MR. JUSTICE WINDES, after making the foregoing statement, delivered the opinion of the court.

It is claimed by appellants, first, that the court acquired no jurisdiction of the principal defendant, John F. Nichols; second, that the evidence was insufficient to support the

decree; and third, that appellee has no just or legal claim to the annuity given by said will to John F. Nichols.

We have deemed it unnecessary to set out the details as to how the court acquired jurisdiction of the principal defendant, John F. Nichols, because the point of contention of appellants is that the record fails to show jurisdiction of this defendant for the reason that he was defaulted after publication notice, pursuant to the statute in such case made and provided, and the record failed to show when such publication was made.

Since the filing of appellants' brief this defect, if any, in the record, has been supplied by a supplemental record, which shows that the notice of publication in all respects was regular and sufficient to give the court jurisdiction.

Numerous contentions are made by appellants as to different matters with respect to which it is claimed the appellee failed to make proof of the allegations of her bill. We have considered them all, and regard the proof sufficient. We have deemed it necessary only to refer to the claims that there is no proof that the judgment was revived; that it had not been paid; as to the finding of the master that the judgment was recovered in 1898; and the part of decree directing appellants to pay the costs. It appears from a certified copy made by John A. Cooke, clerk of the Circuit Court of Cook County, Illinois, certified by him to be a true, perfect and complete copy of an order entered of record upon the 7th day of January, 1892, in a certain cause lately pending in said court, wherein James E. Graham was plaintiff and John F. Nichols was defendant, that it appeared to the court that said defendant had been duly notified of the pendency of said cause by publication, according to the statute in such case made and provided; that his default had been entered of record, and that at the January term, 1878, of said court, to wit, on the 24th day of January, 1878, said plaintiff recovered a judgment against said defendant for the sum of \$4,436.13 and costs, and that said judgment still remains in full force and effect, and is in no wise set aside, paid or satisfied; and the court thereupon ordered that said judgment for said amount and costs

against said defendant be and the same was hereby revived and had the same force and effect as at the original rendition thereof, and that execution issue therefor. This we regard as sufficient proof of the recovery and revival of the judgment and that it still remains unpaid.

This proof also overcomes the error of the master in finding that the judgment was recovered in 1898 (which was evidently a clerical error), and conforms to the finding in the decree of the court.

The provision of the decree that appellants pay the costs of the suit is proper, in view of the finding of the master, which is supported by the evidence, that \$600 had been paid by appellants to Nichols since the beginning of the suit, one-half of which payment was made after the service of process upon appellants. Moreover, appellants have assigned no error in this respect, and therefore are precluded from now insisting on this objection to the decree.

Under the third claim of appellants it is contended that the provision made by Mrs. Nichols in her will is such that it is expressly excepted under our statute regarding creditors' bills (chapter 22, section 49), which provides that where "a trust has in good faith been created by, or the funds so held in trust has proceeded from, some person other than the defendant," and therefore appellee can not reach the annuity in question by her bill. The case of *Steib v. Whitehead*, 111 Ill. 252, is especially relied on as supporting this contention. The trust under consideration in that case was of certain real estate which the trustees were directed to keep well rented, pay taxes, make repairs, insure against damage by fire, and "to pay over all remaining rents and income in cash into the hands of my said daughter Juliette in person, and not upon any written or verbal order, nor upon any assignment or transfer by the said Juliette," and at the death of Juliette the trust estate was to cease and the land vest in her heirs, and in default of such heirs, then to descend to the heirs of testator then living. It was held that the net income of the estate devised was not liable to garnishment in the hands of the trustees for the debts of the beneficiary, and the court said, among other things:

"The property was not placed in her possession so that she might appear as owner when she was not, and thereby obtain credit. An examination of the public records would have shown that she had no power to sell or assign her equitable interest, that the extent of her right was to receive the net accumulations of the trust estate from the hands of the trustee, and that these accumulations did not become absolutely hers so as to render them subject to legal process for her debts until actually paid to her."

The case at bar is, in our opinion, widely different. The annuity was to be deposited in a bank quarterly, to the credit of Nichols and subject to his order, and was clearly a provision by the testator made in lieu of Nichols' rights and interests under our statute in the estate of his wife, of which he could not be deprived by will. It was subject to his order at any time, and therefore subject to his debts.

Moreover, the provision of the statute above quoted and relied upon by appellants is taken literally from the New York statute upon the same subject, which has been construed by the New York courts, and such being the case the courts of this State will be presumably governed by the decisions of the New York courts. *Campbell v. Foster*, 35 N. Y. 361-6; *Degraw v. Clason*, 11 Paige, 140; *Clute v. Bool*, 8 Paige, 86; *Williams v. Thorn*, 70 N. Y. 270; *Singer & Co. v. Wheeler*, 6 Ill. App. 225; *Young v. Clapp*, 147 Ill. 187.

The two last cases above noted, while they do not consider the particular clause of our statute here under consideration, hold in effect that our courts will adopt the construction given to the same statute by the New York courts as to other provisions in it.

The *Campbell* and *Williams* cases, *supra*, while they discuss the provision of the New York statute which we have adopted, relate to another provision of the statute, which allowed the creditor to reach the surplus income from trusts which came within the express provisions of the part of the statute adopted by our State, beyond what was necessary for the suitable support and maintenance of the *cestui que trust* and those dependent upon him. The cases, however, approve of the previous decisions of the New York courts

as to that part of the statute of New York adopted by Illinois.

In the Clute case, *supra*, the court say :

"If the life interest of the defendant in the fund is of such a nature that he can sell and dispose of it without restriction or limitation, then according to the decision of this court in the case of Hallett v. Thompson, (5 Paige, 583,) the whole annuity may be reached at once and applied to the payments of his debts without reference to his present or future wants."

In the Degraw case, *supra*, an annuity for life or widowhood in lieu of dower was held subject to a creditor's claim, and the court said :

"I can see no ground whatever for considering this bequest as a trust, any more than in the case of an ordinary pecuniary legacy payable immediately and charged upon the real estate as well as upon the personal estate of the testator generally."

Moreover, the annuity in question was a mere offer by Mrs. Nichols to her husband for his interest in her estate. As we have seen, there was real estate of the value of \$37,500, in which he was entitled to a life estate of one-third. There was also personalty of the value of more than \$30,000, of which he could have taken one-third by renouncing the annuity. He was at liberty to accept or reject the annuity, and having elected to accept it, he took it as a purchaser, and it is subject to his debts the same as any other legacy. The Degraw case, *supra*; Blatchford v. Newberry, 99 Ill. 11; Carper v. Crowl, 149 Ill. 479; Isinghart v. Brown, 1 Ed. Ch. 413.

We find nothing in a stipulation in the record referred to by counsel, which would in any way change the findings of the master and the court, or which would in any way tend to modify, in our opinion, the clear provisions of the will, which show that the annuity was given in lieu of the dower and other interests of Nichols in his wife's estate, and place it upon the same basis as that of an ordinary legacy, and therefore subject to his debts. The decree of the Superior Court is affirmed.

Highley v. Metzger.

Gomer E. Highley v. Sophia C. Metzger.

86	573
186	253
86	573
102	872

1. APPELLATE COURT PRACTICE—*When Motions Come Too Late.*—Matters of mere irregularity require a party objecting to move at the first opportunity.

Assumpsit, upon a promissory note. Appeal from the Circuit Court of Cook County: the Hon. JOHN C. GARVER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

GEO. S. STEERE, attorney for appellant; H. W. WAKELEE, of counsel.

LOESCH BROTHERS & HOWELL, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was commenced by appellee to recover upon a promissory note made by appellant for the sum of \$1,300. Appellant pleaded the general issue and want of consideration. To the latter plea a replication was filed, stating that there was a good and valuable consideration and concluding to the country. No rejoinder was filed to that replication. September 23, 1898, the usual notice and affidavit were filed to place this suit upon the short cause calendar. Upon the notice thus filed were the general number and the term number, and the case was thereupon placed upon the short cause calendar. The call of that calendar was commenced October 31st, more than five weeks after notice to place said cause upon said calendar was served upon appellant's attorney. The day last named appellant moved to strike said cause from said calendar, and in support of such motion filed an affidavit made by the attorney of appellant. That motion was overruled the same day. The trial of cases upon said calendar was not concluded October 31st, and the call thereof was continued the next day, when this cause was reached and tried and judgment entered against appellant.

The points made and urged by appellant in this court as reasons why said judgment should be reversed are, (1) the notice to place the case on the short cause calendar was insufficient, and (2) the case was not at issue when tried.

First. It is a sufficient answer to the first point to say that the motion came too late. Matters of mere irregularity require a party objecting to move at the first opportunity. *Johnston v. Brown*, 51 Ill. App. 549; *Stewart v. Carbray*, 59 Ill. App. 397; *Belinski v. Brand*, 76 Ill. App. 404.

Said affidavit, upon which the motion to strike said cause from the short cause calendar is based, was made October 29th, five weeks after said notice was served upon the attorney who made the affidavit. And besides, there is no substantial reason stated therein why said cause should be stricken from said calendar.

Second. Nothing was wanting to put said cause formally at issue except a *similiter*. There was no error in proceeding to try said cause without the adding of the *similiter*.

The plea of want of consideration is not verified, and there is no statement in said affidavit that appellant has any defense upon the merits.

The judgment of the Circuit Court is affirmed.

M. M. Green, Nellie M. Novak, F. H. Novak and The Homestead B. and L. Ass'n v. Illinois and Wisconsin Lumber Co.

1. PRESUMPTIONS.—*As to Amendments.*—Where the record is silent upon the subject the court will presume that the judge of the trial court had before him sufficient data, as a part of the court records or files in the case, upon which to base the amendment in question.

Mechanic's Lien.—Error to the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

Green v. Illinois & Wisconsin Lumber Co.

NOVAK & NOVAK, attorneys for plaintiffs in error.

LYNDEN EVANS, attorney for defendant in error.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This was a proceeding to enforce a mechanic's lien in favor of the defendant in error against the plaintiff in error Green, and certain premises owned by him, and this writ of error is prosecuted from an order entered by the Circuit Court amending the decree after the expiration of the term at which the decree was entered.

The decree was entered June 24, 1898, which was of the June term, 1898, and the amendatory order was entered August 12, 1898, which was of the July term, 1898, of said Circuit Court. The amendatory order was entered *nunc pro tunc* as of the date of the entry of the decree.

The only assigned errors that are not abandoned are such as attack the amendatory order. The specifically assigned error in that regard is as follows:

"2d. The court below erred in entering the order of August 12, 1898, changing the description of the property described in the original decree entered on the 24th day of June, 1898, the June term of said court having long expired, and the correction not being a clerical error but a complete change of the description of the real estate, and making it a lien on real estate other than that described in the original decree filed June 24, 1898."

The decree as originally entered found that appellee was entitled to and had a lien upon "lots one, two, three and four of block sixteen in West Pullman," etc.

The amendment made by the order complained of consisted in inserting immediately, before the description above quoted, the words: "Lots one and two of the resubdivision of."

The transcript of the record before us was made in accordance with a praecipe for the record filed by the plaintiff in error, and omits the bill or petition filed for the lien, the master's report and all the evidence upon which the decree was based.

We will presume, therefore, that the judge of the Circuit Court had before him sufficient data, as part of the Circuit Court records or files in the case, upon which to base the amendment.

If the petition for the lien, the master's report and the evidence, all contained the description of the premises, as set forth in the decree as amended—as we will, in their absence from the record before us, presume they did—the amendment was purely clerical in its nature and was clearly within the power of the court to make, even after lapse of the term.

The master's report of sale shows that he did not advertise the property for sale until August 18, 1898, six days after the decree was corrected, and that the premises were not sold until September 9, 1898. There has been no sacrifice of or injury to intervening rights, by the amendment, and we can see no shadow of error in allowing it to be done. Affirmed.

Charles C. Heisen and John A. Albert v. Peter R. Westfall.

86 576
s212s 68

1. PLEADINGS—*Non Damnificatus to Actions on Bond*.—Where a bond sued upon provides for a penalty or forfeiture, the plea of *non damnificatus* is proper, and will admit of the introduction under it of evidence tending to show what, if any, actual damages suffered for which the obligee is entitled to be indemnified by reason of a breach in the condition of such bond, but if the bond provides for liquidated damages *non damnificatus* is not a proper plea.

2. BONDS—*Penalties and Liquidated Damages*.—The difference between a penalty and liquidated damages is that the former is regarded as a forfeiture, from which the defaulting party can be relieved, while the latter, being the agreed damages for breach of the condition of the bond, the parties are holden to it.

3. SAME—*Whether a Penalty or Liquidated Damages*.—Whether the sum named in a bond is a penalty or liquidated damages is to be determined by the intention of the parties. Where the obligation is evidently made for the attainment of another object or purpose to which the stipulation itself is wholly collateral, the sum named will be con-

Heisen v. Westfall.

sidered a penalty; but where the damages are uncertain, and not capable of being ascertained by any satisfactory known rule, the sum mentioned will be regarded as liquidated damages.

Debt, on a penal bond. Error to the Circuit Court of Cook County: the Hon. CHARLES G. NEELY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 16, 1900.

PENCE, CARPENTER & HIGH, attorneys for the plaintiffs in error.

GAGE & DEMING, and SAMUEL A. FRENCH, attorneys for defendant in error.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Defendant in error, Peter R. Westfall, sues to recover upon a bond, the condition of which is as follows:

"Whereas, said Peter R. Westfall claims to own or hold some right, title or interest in said premises,

Now, therefore, said Albert covenants and agrees that he will remove or cause to be removed off and from the said premises, hereinbefore described, all erections, piling or improvements of all kinds that he shall hereafter erect upon said premises before or by the expiration of the term of his said lease of said premises, and will restore said premises to the same condition they were in at the date of said lease; the same to be done at his own cost and expense; that in such case this obligation shall be void and of none effect, otherwise shall remain in full force."

The trial court sustained demurrers to all the pleas filed by and in behalf of the plaintiffs in error, and the latter electing to stand on their pleas, judgment was rendered in favor of Westfall and against Heisen and Albert, in debt and damages for the full penalty named in the bond, viz., five thousand dollars.

It is said by counsel for defendant in error, Westfall, that "the only question here to be determined is as to the ruling of the court below in sustaining the demurrers to these pleas."

There are four pleas to which our consideration is espe-

cially invited. These are, first, *non damnificatus*; second, that the plaintiff has been damnified by his own wrong; third, that the property upon which the piling and buildings mentioned in the bond were erected belonged to the defendant Heisen, and that Westfall had no interest therein; fourth, that the bond was given pursuant to an order of a court of chancery to indemnify Westfall against damages in case the buildings in question were not removed, and is therefore an indemnifying bond, this last plea concluding with *non damnificatus*.

It appears from these pleas that the said Westfall, defendant in error here, filed his bill of complaint under the "Burnt Records Act" in the Circuit Court of Cook County against said Heisen and Albert, the plaintiffs in error here, with others, seeking to establish title of said Westfall to the premises described in the bond now sued on. Plaintiffs in error appeared and answered, and said Heisen filed his cross-bill in such proceeding, claiming title in himself to said premises in fee simple, and asking to have his title confirmed.

Subsequently, upon application of Westfall, an injunction was issued restraining said Heisen, and Albert as Heisen's lessee, from constructing piling and building upon said premises, which, it is said, were being erected by Albert for a bathing establishment upon said land.

Afterward the court entered in the chancery proceeding the following order:

"The cause coming on to be heard, on motion of John A. Albert, defendant, to dissolve the injunction theretofore issued herein, and the court being fully advised in the premises, doth order and decree that the said injunction be dissolved as to said Albert, upon condition that he waive all claim to damages by reason of the suing out of said writ; and on further condition that said Albert give bond, with security to be approved by the court, in the penal sum of five thousand (5,000) dollars that he will remove or cause to be removed off and from the premises described in the lease, in his answer filed and referred to, all erections, piling or improvements of all kinds that have been or may be placed thereon by him, and to restore said premises to the same

condition they were in at the date of said lease, within the term of said lease, or at his own cost and expense, and the court reserves the right to make any order necessary in the premises or to carry out this order."

It is averred that the bond sued upon in the case before us is the bond given pursuant to the foregoing order; that the suit to establish or confirm title to the land is still pending and undetermined. For our present purposes these facts must be deemed admitted by the demurrers.

It is first contended by counsel for defendant in error that the plea of *non damnificatus* is not a good plea to an action of debt on a bond conditioned that the defendant perform some particular thing, as it is claimed is the condition of the bond here. The primary and controlling question, however, is whether the bond declared upon provides for a penalty or forfeiture, or for liquidated damages. If the former, then the plea of *non damnificatus* is a proper plea, and will admit of the introduction under it of evidence tending to show what, if any, actual damage Westfall has suffered, for which he is entitled to be indemnified by reason of a breach in the condition of such penal bond.

The order of court, in pursuance of which this bond was given, provided for a bond with security in a "penal sum of five thousand dollars." It is apparent and must be presumed, at least until the contrary appears, that the parties intended, in executing said bond, to comply with the order of the court, and not to enlarge the liability they were by the court's order required to assume. The difference between a penalty and liquidated damages is that the former is regarded as a forfeiture, from which the defaulting party can be relieved; while the latter, being the agreed damages for breach of the condition of the bond, the parties are holden to it. Whether the sum named is one or the other will be determined by the intention of the parties. Where the obligation is evidently made for the attainment of another object or purpose, to which the stipulation itself is wholly collateral, the sum named will be considered a penalty merely. Where, however, the damages are uncertain, and not capable of being ascertained by any satisfactory known

rule, the sum mentioned will be regarded as liquidated damages. See Bouvier's Law Dict., title, "Liquidated Damages." In the case of Perkins v. Lyman, 11 Mass. 76 (81), it is said:

"The question whether a sum of money mentioned in an agreement shall be considered as a penalty, * * * or as damages liquidated by the parties, is always a question of construction, on which, as in other cases when a question of the meaning of the parties in a contract provable by a written instrument arises, the court may take some aid to themselves from circumstances extraneous to the writing. In order to determine upon the words used, there may be an inquiry into the subject-matter of the contract, the situation of the parties, the usages to which they may be understood to refer, as well as other facts and circumstances of their conduct; although their words are to be taken as proved by the writing exclusively."

Even though the parties fix a sum to be paid, and call it liquidated damages, that fact will not always control the measure of recovery for a breach of the contract. Courts will look to the nature and purpose of the damages to determine whether it shall be treated as a penalty. *Goodyear Co. v. Selz, Schwab & Co.*, 157 Ill. 186 (192), and cases there cited. The question will be determined in accordance with the intention of the contracting parties, whether the sum named to secure performance will be treated as liquidated damages or as a penalty. *Gobble v. Linder*, 76 Ill. 157 (158).

In the case before us the object of the order dissolving the injunction was to allow Albert, as lessee of Heisen, claiming to own the land in controversy, to put in piling and construct buildings so as to make his lease of value pending the settlement of the question of title between Heisen and Westfall. The bond was required so that in case Westfall should ultimately be found owner of the premises he would be protected from damage, if any, caused by such use of the premises by Heisen's lessee. For this purpose the court required a bond in a penal sum. There is no evidence, nothing whatever, tending to show that the parties agreed among themselves, or that the court contem-

plated an award to Westfall, even though it shall ultimately be found that he is not owner of the premises, of damages to the amount of just five thousand dollars, neither more nor less, in case the piling and buildings were not all removed at or before the termination of the lease. The language of the order required a bond in a penal sum to make such removal "within the term of said lease, or at his own cost and expense." The order seems to furnish evidence of the intention of the court and the parties to provide generally against damage if there should be any, which might thereafter appear to have been caused by failure to remove such piling and buildings during the term of the lease or at Albert's cost and expense, the court reserving the power to compel compliance with its order. There is affirmative evidence of the intention of the parties to make this a bond of indemnity. The controversy as to the title was not ended when the bond was given. The ownership of the premises had not been ascertained. The bond was required to guard against a contingency. If Westfall is eventually defeated, and Heisen found to be the owner, it would be a singular administration of injustice which required plaintiffs in error to pay to Westfall five thousand dollars damages, even though the chancery court so determined the issues as to make it apparent he has suffered no damage at all. We find no justification for supposing such to have been the intention, and no reason in the case why we should so hold as might enable defendant in error to recover five thousand dollars to which he may have no real claim whatever.

It is said by counsel for defendant in error that in the case at bar their client's damages for breach of the condition of the bond are not capable of being ascertained by any satisfactory and known rule. In support of this claim a number of things are mentioned which, it is said, might cause damage. But the only damages to which, in any event, defendant in error could be entitled, are such as are caused by the breach of the condition, viz., failure to remove the piling and buildings, and restore the premises as they were at the date of the lease, and these are easily capable

of ascertainment in the usual way. No satisfactory reason is pointed out why there need be uncertainty in, or difficulty in ascertaining such damages. Where, by the terms of the contract, the damages are not difficult of ascertainment, and the stipulated damages are unconscionable, the stipulated damages will be regarded as a penalty. *Goodyear Co. v. Selz (supra)*, p. 193.

It is apparent in this case that the damages for breach of the condition had not been the subject of calculation, agreement or adjustment when the bond was given. This is evident from the nature of the case. Indeed it is not claimed that they were. The bond itself was not given because the parties so agreed, but because the court exacted it as a condition of the use of the premises by the lessee pending the litigation over the title. It must be regarded as intended to indemnify defendant in error in case it should subsequently appear that he had been damaged by such use of the premises. It follows that the demurrers to the first and fourth of the pleas under consideration were improperly sustained.

The judgment of the Circuit Court must be reversed and the cause remanded.

Isadore Plotke v. The Chicago Title & Trust Co. et al.

1. COUNTY COURTS—*Power to Remove an Assignee.*—The County Court has power to remove an assignee for sufficient cause shown.

2. ASSIGNEES—*Cause for Removing.*—The court holds that the evidence in this case is of such a character as to warrant the order of removal of the assignee.

Petition to Remove an Assignee.—Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

WM. A. MARSH, attorney for appellant; G. W. AMBROSE, of counsel.

ROSENTHAL, KURZ & HIRSCHL, attorneys for appellees.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Negley & Co. filed their deed of assignment in the County Court, to the appellant, for the benefit of their creditors, on December 22, 1896, and under it the appellant qualified and proceeded to administer the affairs of the insolvent estate. About one year after the assignment a petition was filed in the County Court, by the assignors and a majority in interest of the creditors of the estate, asking for the removal of the appellant as assignee, and the appointment of some proper person in his place.

The petition charged appellant, as assignee, with numerous acts of malfeasance and misfeasance in connection with the estate, and the appellant answered, denying some of the charges, confessing and avoiding others, and insisting that if he be allowed his reasonable fees as assignee, and his proper charges for attorney's services, procured by him to be rendered in behalf of the estate, he will have accounted for substantially everything that has come to his hands as assignee.

Upon the hearing, the order appealed from was entered in accordance with the prayer of the petition. That order, and its recitals and findings, are as follows:

"Now comes on to be heard the petition filed herein of Henry C. Negley and Eliab L. Negley, assignors, and of various creditors of said insolvents named in said petition, whose claims have been duly filed herein, praying for the removal of Isadore Plotke, assignee of the estate of said insolvent debtors, and for the appointment of a successor of said assignee, and for an order directing the said assignee to turn over the balance of said estate in his hands to such successor, which said petition was filed herein on December 11, 1897.

And the court having fully heard the same, and the answer of Isadore Plotke, assignee herein, to said petition, and upon the full inspection of the files, orders and records of this court in this matter, and upon the evidence heretofore taken in this court upon the hearing for an allowance of assignee's and attorney's fees in this case, and the argument

of counsel for the respective parties herein, and all the parties in interest being present,

The court finds that the said Isadore Plotke, assignee herein, has neglected his duties as such assignee; that he has mismanaged said estate; that he has misappropriated and loaned to others, without leave of court, proceeds of said estate; that he has neglected and refused to comply with various orders of this court in matter of the accounting and distribution of said estate, and has neglected to distribute the proceeds of said estate, and has made unreasonable and unjust claims and demands for his services as assignee, and for services of his attorney; that he has appealed from the order of this court heretofore entered, disallowing his petition of assignee's and attorney's fees; and that his attitude is antagonistic and hostile to the interest of the creditors of said estate, and the assignors of said estate and the interest of said estate; that he has been continually, ever since his appointment as assignee herein, derelict in his duty, and has improperly administered said estate; and that the said assignee is guilty of wasting and misapplying the said trust estate.

And it is therefore ordered and decreed by this court that the said Isadore Plotke, assignee herein, be and he is hereby removed as such assignee, and that the Chicago Title and Trust Company be and is hereby appointed in his stead as assignee of said estate to fulfill the duties of said trust; and that the said Isadore Plotke forthwith turn over to his said successor all the estate in his hands, amounting to eleven hundred seven dollars and eighty-eight cents (\$1,107.88), and that his said successors, upon giving bonds, as provided by law, shall have full power to execute the duties of such assignee, as provided by statute in such case made and provided.

And it is further ordered and decreed that upon the receipt by said successor of the estate so turned over to him by said Isadore Plotke, such successor hold the same until the final determination of the appeal by the said Plotke from the order disallowing assignee's and attorney's fees, and until the further order of this court."

It will be seen by the recitals of the order that the County Court took into consideration, upon the hearing of his petition, the evidence theretofore taken upon the hearing of appellant's application for an allowance of fees to himself as assignee; and appellant makes the point that the evidence was improperly considered by the court upon

this petition. But he has brought up the record in that proceeding, including the bill of exceptions containing the evidence taken upon such application, and has filed it as a part of the record in this appeal, and has made a lengthy abstract of it for our use in considering whether the petition was properly acted upon.

We must consider such evidence as properly before us. And it was manifestly proper for the County Court to consider such evidence. An assignment proceeding under our statutes is an entire proceeding, so far, at least, as the conduct of an assignee in the administration of the affairs of the estate is concerned, and evidence taken upon an application by the assignee for his fees, which tends to show that he has been guilty of such misconduct in managing the estate as to disentitle him to an allowance for fees may properly be considered upon an application by the same parties who resisted his application for fees, for his removal as assignee for the same misconduct. Evidence so taken must stand for whatever it is applicable in the proceeding.

The power of the County Court to remove an assignee for cause can not be doubted. Secs. 20 and 48, Chap. 72, Starr & Curtis' Annotated Statutes.

We do not repeat the evidence. It was of a character that warranted the order. Indeed, counsel for appellant does not contend that the order was not a proper one under the evidence, but insists that the evidence was not properly before the County Court in this removal proceeding, which is the only proceeding now before us.

We discover no error, and the order of the County Court is affirmed.

Fuller & Fuller Company v. Henry M. Feinberg.

1. SALES—*When the Vendor Has No Title.*—The general rule is that no one can acquire a title to chattels from a person who has no title to them himself.

2. CHATTEL MORTGAGES—*Mortgagee's Right Under the Insecurity*

Clause.—Where the mortgagor's conduct, under all the circumstances, indicates a dishonesty of purpose, with reference to the property of another which, if carried into his business relations, might well cause solicitude with reference to the debt secured by the mortgage, it will justify a taking possession of the property under the insecurity clause by the mortgagee.

Trespass, to personal property. Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 16, 1900.

Statement.—In March, 1894, appellant sold to appellee, and conveyed by bill of sale, a stock of drugs and fixtures contained in a certain drug store located in Chicago. Appellee paid part of the purchase price in cash, and to secure the balance executed a chattel mortgage upon the stock and furnishings mentioned. The mortgage contained an insecurity clause in the usual form.

Among the articles in the store at the time of the sale to appellee was a soda fountain. This was not mentioned among the things specifically conveyed by the bill of sale, nor was it referred to in the chattel mortgage. It was not owned by the appellant, and the latter alleges that it had no right, authority or intention to convey it to appellee by the bill of sale or otherwise. It was the property of the Matthews Soda Water Company, which is not a party to this action. The fountain was in the store when appellant acquired the property originally, and the bill of sale to appellant contained the same words of description as the bill of sale from appellant to appellee.

Shortly after the sale appellant learned that appellee claimed to own the said soda fountain, by virtue of a general clause in the bill of sale, and that he refused to give it up or acknowledge the title of the real owner. Thereupon, after fruitless negotiations, the officers of appellant feeling, as it is alleged, that the course of appellee indicated a disposition which might prejudice the payment of the balance of the purchase money, and make it insecure, notified him that unless he permitted the owner of the fountain to remove it, the chattel mortgage would be foreclosed.

Appellee refused to surrender the fountain, and the mortgage was placed in the hands of an officer to foreclose. The latter having taken possession of the premises, appellee was given time to raise the balance due, and while he was gone for this purpose the owner of the fountain removed his property. Meanwhile appellee raised the money to pay off the mortgage debt, and the store was returned to his possession, none of the property having been removed or disturbed. The officer had been in possession about six hours. Afterward appellee brought his action for an alleged trespass. A verdict was returned and judgment rendered in his favor for \$500, from which judgment this appeal is prosecuted.

CHARLES LANE, attorney for appellant.

JOHNSON & MORRILL, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an action in trespass brought by appellee to recover for the alleged misconduct of appellant and its agents in connection with the foreclosure of the chattel mortgage.

The main contention is with reference to the damage claimed to have been suffered from the removal of the soda fountain by the real owner during the time the premises were in possession of the constable under the chattel mortgage. It is conceded that the owner of the fountain was the Matthews Soda Water Company, which is not a party to this action. It is conceded also that appellee had refused to deliver the fountain to the owner, or permit the latter to remove it. Appellee claims to have taken the advice of counsel, and to have been told that he could hold the fountain under the general clause of the bill of sale. It is apparent, and seems to be conceded by his counsel in this case, that he could not have established title in himself against the true owner. Yet he persisted in holding on to it, and now claims that he did so in good faith, believing, because so advised by his counsel, that it had been conveyed to him by appellant by the wording of the bill of sale.

There is conflict in the evidence, but there is a preponderance tending to show that appellee was expressly informed, and did know when he purchased and when the bill of sale was executed, that the fountain did not belong to appellant and was not intended to be conveyed by the bill of sale. Appellee's claim of good faith in holding on to it appears to be based, not upon a rightful purchase, not upon any honest supposition that he had really bought and paid for the fountain, but upon a lawyer's advice that he could maintain a claim he knew to be wrongful upon a technical construction of the wording of the bill of sale. The clause in question is in the concluding general words, and mentions the "stock of goods, wares and merchandise and all other personal property not hereinbefore specified and enumerated." A fair construction of this general language can not, we think, include the soda water fountain. The clause is preceded by a specific list of articles conveyed, mentioning such things as scales, show cases, counters, prescription case, show and shelf bottles and globes, chandeliers and gas fixtures, and the "fountain stand." The fountain itself is not included in the list, and if it was intended to be included its omission as a conspicuous article would probably have attracted attention. But the undisputed facts indicate that such was not the intention of the appellant, and the evidence preponderates that it was not the expectation of the appellee. It is said in *Rothwell v. Alves*, 60 Ill. App. 156 (158):

"Such an intention, under the circumstances, is not to be imputed to the vendor unless it is manifested with reasonable clearness."

The general rule is, that no one can acquire a title to chattels from a person who has no title to them himself. Exceptions to this rule are not such as are applicable in the case at bar. *Fawcett v. Osborne*, 32 Ill. 411. The evidence is undisputed that the fountain was taken away by the real owner, who was entitled to its possession. Appellee is not liable in trespass for the act of such owner in merely reclaiming his own. This is not a suit upon a warranty of title, real or implied. See *Klein v. Siebold*, 89 Ill.

540 (542). Nor can appellee complain if the true owner was assisted in peaceably recovering his property by employes or representatives of appellant. It is not trespass to peaceably assist another in doing a perfectly lawful act in a lawful way.

It is said by appellee's counsel that "actual possession, though without the consent or even adverse to the real owner, will be sufficient as against a wrongdoer or one who can show no better title"—quoting from *Miller v. Kirby*, 74 Ill. 242. In this case, however, appellee was not at the time in possession of the premises. The constable was in possession under the chattel mortgage. The property was taken away by the real owner, who had the better title. It is clear, we think, that appellee suffered no damage for which he is entitled to recover by reason of the removal of the fountain. It follows that it was error to permit the introduction of evidence relating to the removal and value of the soda fountain as tending to sustain the claim for damages.

It is said by counsel for appellee that although appellant's agents did not cause any disturbance, or treat appellee with indignity, or disturb or remove his stock, yet the latter is entitled to recover punitive damages, because at the time of the foreclosure the indebtedness secured by the chattel mortgage had not matured. We can not agree with this contention. The evidence on both sides shows that appellee was holding on to the fountain without right and refusing to surrender it.

We can not avoid the conclusion that appellant was justified in regarding appellee's conduct under all the circumstances as indicating a dishonesty of purpose with reference to the fountain, which, if carried into appellee's business relations might well cause solicitude with reference to the debt secured by the mortgage. We find in this no evidence of a reckless disregard of appellee's rights.

Other points are discussed by counsel, which, in view of the conclusions stated, we need not consider in detail.

The judgment of the Circuit Court is reversed and the cause remanded.

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Walter S. Kemeys and Gerrit S. Miller, Executors, etc.,
et al., v. Charles Netterstrom et al.

1. **CROSS-BILL**.—*Dismissed for Want of Equity*.—Where the circumstances of a transaction, as alleged in a cross-bill, disclose no equity, the cross-bill should be dismissed.

Foreclosure Proceedings.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed January 16, 1900.

BAYLEY & WEBSTER, attorneys for appellants.

CHYTRAUS & DENEEN, attorneys for appellees; CHARLES H. HAMILL, of counsel.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Appellants' testator filed his bill to foreclose three trust deeds given by William Kinsella to Edwin F. Bayley, trustee, to secure his, Kinsella's, promissory notes aggregating the principal sum of seventy-five hundred dollars, for money loaned.

The appellees, Netterstrom and Vider, were, with others, made parties defendant, and they answered denying the material allegations of the bill, but setting up no affirmative rights. Some time afterward, they were given leave to file a cross-bill. The purpose of the cross-bill was to foreclose a deed absolute upon its face, but in reality intended as security, made by the said Kinsella to one Lindsten, which in effect constituted a second mortgage upon the same premises covered by the prior trust deeds to Bayley, and to establish an equitable lien prior to and as against the Bayley trust deeds, to the extent of \$1,345.72, alleged to have been paid by cross-complainants for certain outstanding certificates of a tax sale of the property, made subsequent to the making of the Bayley trust deeds, but before the making of the deed to Lindsten.

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The master to whom the cause was referred reported adversely to the cross-complainants in respect of their claim of priority over the Bayley trust deeds for the amount, or any part of it, paid by them for the tax certificates, and recommended that the court deny the prayer of the cross-bill in such respect. The Circuit Court, however, sustained exceptions to the master's report, and gave the decree appealed from, according to the prayer of the cross-bill.

The questions raised here relate wholly to the propriety of the decree in so far as it gives a priority of lien to the cross-complainants for the amount paid for the tax certificates.

The tax certificates were originally held by one Johnson, who had previously agreed with Bayley, who was not only the trustee named in the trust deeds, but was also the agent of the loan owner, not to part with them to any third party without Bayley's consent. The cross-complainants, Netterstrom and Vider, came to be concerned in Kinsella's affairs in this regard, because of a joint judgment for some \$6,800 having been recovered against them and him in the United States court, which, as between themselves, he ought to pay one-third of.

They, Netterstrom and Vider, seem to have been able to pay their share of that judgment, but he, Kinsella, was unable to pay his part.

After considerable negotiation it was substantially arranged that Netterstrom and Vider should lend to Kinsella an amount about equal to his share of that judgment, and take as their security his equity in the real estate covered by the Bayley trust deeds, and some other of his real estate. There was also a junior judgment for \$4,000 against Kinsella alone, in the United States Court, which under the proposed arrangement was to be cut out by a sale under the prior joint judgment, if possible.

At first it was contemplated that the amount Netterstrom and Vider would be required to loan to Kinsella would be in the neighborhood of \$2,000, but it was soon ascertained that these tax certificates must be procured, in order that

they should not constitute a lien prior to the conveyance that Kinsella should make of his equity in the land, and thereupon \$4,000 was the sum agreed upon to be advanced by Netterstrom and Vider.

Johnson, the holder of the tax certificates, was willing, as he could not help being, that the tax sales should be redeemed from, but he was not willing, nor at liberty under his agreement with Bayley, to sell the certificates to anybody but Bayley or his principals without Bayley's consent. It therefore became incumbent upon Kinsella's attorney, Mr. Anderson, who was also acting for Netterstrom and Vider, with Kinsella's approval, to procure Bayley's consent that Johnson might sell the certificates. For some reason, not very plain, it was thought that acquiring the tax certificates would in some way lend additional security to Netterstrom and Vider—perhaps in some eventuality as against the junior judgment against Kinsella alone—although it is plain it was never intended until after this litigation was begun that they should be used adversely to the Bayley trust deeds.

Mr. Anderson so expressly testifies, and says he was to hold them as a shield to both Netterstrom and Vider and the interests represented by Bayley, so that neither one should procure tax deeds adverse to the others.

Bayley had been pressing Kinsella to redeem from these tax sales, and the trust deeds provided such to be Kinsella's duty. Anderson had been trying for weeks to get somebody to lend Kinsella money with which to get rid of the certificates, and seems to have had reasonable expectations of succeeding without the aid of Netterstrom and Vider, and, after his negotiations with the latter were in progress, he wrote the following letter to Bayley, who was then absent from Chicago:

“CHICAGO, March 25, 1895.

MR. EDWIN F. BAYLEY, Waupun, Wis.:

MY DEAR SIR—I write you in regard to the Kinsella matter, of which I spoke to you some weeks ago. We had found a friend of Mr. Kinsella who had promised to loan

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him a sufficient sum to take up the tax certificates and the judgment, of which I spoke to you, and the papers and arrangements had all been completed, when to our very great disappointment, on Saturday last he backed out because he had made up his mind to go to Europe and didn't want to leave a matter of that kind open.

This morning I got a client of mine, who is also a friend of Mr. Kinsella's, to agree to advance the money, but he can not advance it all until we complete our arrangements about selling the property under the judgment of which I spoke to you, but he will advance a sufficient sum to take up the tax certificates, but he desires to hold them until the other arrangements are made. When that is done the certificates will be canceled. There is no doubt he is acting in the utmost good faith, and Mr. Kinsella is perfectly satisfied with the arrangement, and we were going to complete it to-day, and would have done so, except that Mr. Wm. M. Johnson, who holds the tax certificates, and somewhat in your interest, did not want to sell them to us without your consent. Mr. Waldo knew nothing of the matter, and did not care to interfere, but Mr. Johnson agreed that the additional penalty of twenty-five per cent, which will be added the day after to-morrow in the regular course of the suit, would not be added until next Monday, so that we should have time to communicate with you. I desire to assure you that as soon as the other arrangements are made, and I have not the slightest doubt that they will be made, the certificates will be canceled. The title is perfectly good enough without the aid of those certificates or a deed thereunder.

Will you please send a brief note to Mr. Johnson informing him that you have no objection to me holding the tax sale certificates, as it is arranged that I shall hold them until the other arrangements are made. Otherwise it will not be possible for Mr. Kinsella to raise this money.

Yours very truly,

H. M. ANDERSON."

Mr. Netterstrom testified that his and Kinsella's negotiations for taking up the tax certificates and the judgment, began three or four weeks before April 1st, which includes the date of the above letter. Mr. Bayley does not appear to have replied in writing to Mr. Anderson's letter, but, soon after his return to town, Anderson and he had con-

versations upon the subject, and, under date of April 1st, the following letter was written by Anderson to him :

“CHICAGO, April 1, 1895.

MR. EDWIN F. BAYLEY :

DEAR SIR—I hold tax certificates for the tax sale of 1893, purchased by a client of mine from William H. Johnson, for the sum of \$1,345.72, to the following described property.” (Describing the premises.) “For valuable considerations moved from you to me, for the benefit of my said clients, I hereby agree that if said certificates of sale shall not be canceled of record on or before July 1, 1895, to sell the same to you or any person upon your order for the amount above paid to Mr. Johnson, with interest thereon at the rate of six per cent per annum, from this date until the time of such sale to you or order.

I further agree that this option to you or your order to purchase said tax certificates may remain open for sixty (60) days next after the said 1st day of July, 1895.

H. H. ANDERSON.”

At the time of the writing and delivery of this last letter to Bayley, the tax certificates were not in fact held by Anderson, but the writing was made at Bayley's dictation, as a condition to the giving of his consent to the sale of the certificates by Johnson, and upon its delivery to Bayley he gave the desired consent.

The details being arranged, Netterstrom and Vider procured their note for \$4,000, to be discounted at a Chicago bank, on April 8, 1895, and the entire proceeds were given to Anderson in two checks, one for the sum to be paid to Johnson for the tax certificates, and the other for the balance. With the money so in hand, Anderson took up and obtained the tax certificates from Johnson and procured the joint judgment to be assigned to Lindsten. On the same day Lindsten, to whom Kinsella, in furtherance of the plan, had, by deed dated a few days earlier, conveyed his real estate, executed a declaration of trust setting forth that he held the title to the premises by virtue of said deed, and “by an execution sale by the United States marshal hereafter to be made,” in the case of the joint judgment, “if I shall be purchaser at said sale,” and specifying the trust as
ing in reference to the payment by or for Kinsella of

\$4,000, with interest and expenses of the trust, on or before October 8, 1896, etc. The \$4,000 specified in the declaration of trust to be paid by Kinsella was the same as that represented by the note of Netterstrom and Vider, although not particularly mentioned as such.

Although of not much materiality in this connection, it may be added that shortly after the joint judgment was assigned to Lindsten, a sale of all the premises previously conveyed to Lindsten by Kinsella was had under an execution issued upon the judgment, and the premises bought in by Lindsten, and he ultimately obtained a marshal's deed for the premises, thus accomplishing the desired result of cutting out the junior judgment which stood against Kinsella alone.

The difficulty in the case is not so much about the facts, concerning which there is but little controversy, but as to the rights of the parties under them.

Netterstrom and Vider contend they are entitled to an equitable lien against the premises to the extent paid for the certificates prior to the lien of the trust deeds, and such was the decree of the Circuit Court.

Anderson kept the tax certificates from the time he bought them for his clients until some time in the summer of 1895, when upon the demand of a clerk in the employ of Bayley's firm that they be either canceled or surrendered, he surrendered them to the clerk, and they have been kept under Bayley's control ever since.

The certificates were issued September 27 and 28, 1893, and they were surrendered to Bayley not long before two years thereafter would expire.

We do not regard the circumstances of Anderson surrendering the certificates to Bayley and of Bayley in keeping them, as possessing any controlling weight in the matter. Neither Anderson nor Bayley could equitably have acquired a tax title under them adverse to the interests of the other. It is unquestioned that no notices as required by law, had been served in order to entitle anybody to take out tax deeds under the certificates, and that the fact was as Ander-

son believed it to be when he gave them up to Bayley, they possessed no value for tax title purposes except possibly in view of a subsequent tax sale of the property within the two years from the date of the sale for which they were issued; that two years had not then elapsed, and nobody could foresee that such subsequent tax sale would occur. It was not the duty of Bayley, or his principal, to prevent such sale by payment of the taxes, but still remained the duty of Kinsella or Lindsten, or of Netterstrom and Vider, for whose benefit Lindsten held the title in trust, to do so. Neither Kinsella, Lindsten or Netterstrom had any right to acquire a tax title through a subsequent tax sale adverse to the Bayley trust deeds. And no more could they or either of them, through any manipulation of the tax certificates in question, after their purchase of them under the circumstances detailed, acquire a tax title against Bayley which could be sustained in equity. Every purpose for which the certificates were taken up and held by Anderson had been served, and they might well be allowed to expire. Bayley, it is true, had his option under the letter of April 1st, to take up the certificates from Anderson by paying the amount Netterstrom and Vider, or Kinsella, had paid Johnson for them, but he was not bound to do so. He might, as he did, permit them to remain in Anderson's hands and exhaust their force and vitality by lapse of time.

After that had happened, it was, as appears from the evidence, a mere question of whether Bayley or Anderson should pay the cost of canceling the certificates, and as Anderson did not want to do so he gave them up to Bayley, in whose hands they have since remained inoperative.

But though the certificates did cease to have value, Netterstrom and Vider would not necessarily, on that account alone, be deprived of an equitable lien on the premises prior to the Bayley trust deeds if the equities of the case entitled them to it.

The circumstances, however, of the transaction do not disclose any such equity.

Every earmark of the transaction discloses nothing more

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nor less than a loan by Netterstrom and Vider to Kinsella. The latter was under obligations to Netterstrom and Vider to pay his part, as between themselves, of the joint judgment, and he was obligated to Bayley's principals to clear away these outstanding certificates. It was thought that security to Netterstrom and Vider could not be given by Kinsella for money they might advance for the payment of the judgment, unless sufficient money was also furnished to buy the certificates. Money for both purposes was raised. Kinsella paid the interest on the money borrowed, and on one occasion joined Netterstrom and Vider in making a renewal note to the bank for the money borrowed. In equity the transaction was Kinsella's, and Netterstrom and Vider have no more claim to an equitable lien ahead of Bayley than Kinsella has, and he, of course, has none.

The decree of the Circuit Court must be reversed, and the cause remanded to that court with directions to deny the prayer of the cross-bill, in so far as it asks a priority of lien over the Bayley trust deeds in any respect, and to enter a decree in favor of the appellants, in accordance with the prayer of their bill, as recommended by the master. Reversed and remanded with directions.

Ignatius Marous v. Annie Marous.

1. *DIVORCE—Drunkenness as a Ground—What is Sufficient Proof.*—Where the charge of drunkenness is supported by a number of witnesses, who state that the defendant was in the habit of becoming intoxicated from one to three times a week, that his habits of drinking cover a period of four or five years preceding the hearing, and that he was in the habit of drinking intoxicating liquor, generally whisky, on an average of three to five times a day, it is sufficient as a ground for divorce.

2. *SAME—Proof of Adultery*—The fact of adultery can seldom, if ever, be proved by direct evidence. It has therefore been almost invariably held that when the facts and circumstances in evidence lead to that conclusion as reasonable and just, the court and jury will be justified in finding the charge sustained.

Bill for Divorce.—Appeal from the Circuit Court of Cook County: the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 16, 1900.

JOEL W. STEVENS, attorney for appellant.

BANGS, WOOD & BANGS, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

This is an appeal from a decree granting appellee a divorce upon the ground of adultery, and awarding her the care, custody and education of the only child of the parties, together with alimony and solicitor's fee.

No complaint is made as to the amount of such alimony and fees, but it is contended that the evidence does not warrant any decree against appellant.

The bill charges habitual drunkenness for more than two years last preceding, and also the commission of adultery.

After a careful examination of the evidence we can not avoid the conclusion that the decree must be affirmed.

While the trial court did not expressly find the charge of habitual drunkenness sustained, that question is argued at length by counsel for both parties, and it has perhaps some connection with the evidence tending to support the additional cause of complaint, as alleged in the bill. The charge of drunkenness is supported by a number of witnesses, who state that appellant was in the habit of becoming intoxicated from one to three times a week, that his habits of drinking cover a period of four or five years preceding the hearing, and that he was in the habit of drinking intoxicating liquor, generally whisky, on an average, from three to five times a day. Appellee states that from June, 1895, to June 14, 1898, appellant "came home intoxicated on an average of once a week;" that he was sometimes too drunk to attend to business, and would then stay at home and sleep all day; and that he sometimes remained away two nights at a time, returning with clothes soiled and necktie torn. This

testimony certainly tends to show what would ordinarily be regarded at least as a condition indicating an excessive use of intoxicating liquors.

Appellant denies that he is or has been habitually drunk, but states that he is in the habit of going out and taking a drink of intoxicating liquor whenever he feels like it; that it has been his practice to go and take a drink, or sometimes a cigar, with his customers, and that such is the habit of the shop.

His counsel called a considerable number of witnesses, who testify that while appellant would occasionally take a drink, they never saw him under the influence of liquor, although in the habit of meeting him on business or otherwise quite frequently. Most of them had occasionally taken a drink with him or seen him do so, but state that they never saw him drunk.

The only witness who testifies to any act of adultery is a brother-in-law of appellant, who states that he went with appellant, on one occasion, when they had both been drinking, to a place of ill-fame, and that appellant left the room, going with one of the female inmates to a separate apartment, while the witness went in like manner with another inmate. He says they had been going about to various places, drinking more or less, and that both were, at the time, under the influence of liquor. Appellant admits going to the place in question and drinking with lewd women, but denies that he retired to a private room with any of the inmates. He says that he stayed down stairs with the bartender, and, while waiting for his companion to come down, took a walk around the block; that he came back and sent up for his companion, and they then left.

There is thus direct conflict between the two as to the main fact. The trial court, having seen and heard the witnesses, was in a better situation to ascertain the truth than we can possibly be sitting as a court of review, with only the transcript of their testimony before us. *Calvert v. Carpenter*, 96 Ill. 67.

The testimony discloses a situation in which the pre-

sumptions are not in favor of appellant. He admits having been at the place and in company with its disreputable female inmates. The fact of adultery can seldom, if ever, be proved by direct evidence. It has therefore been almost invariably held that when the facts and circumstances in evidence lead to that conclusion as reasonable and just, the court and jury will be justified in finding the charge sustained. *Cooke v. Cooke*, 152 Ill. 286, and cases cited.

We are of opinion that the judgment of the Circuit Court must be affirmed.

Allegretti Chocolate Cream Co. v. B. F. Rubel et al.

1. **TRADE NAMES—Equity Jurisdiction.**—A court of equity will direct and control the use of a man's name, either by himself, or by himself associated with others, in his or their business, so that it shall not be used to work an injury to the business of another person having the same name, or to perpetrate an imposition or a fraud upon the public.

Bill for Injunction.—Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 16, 1900.

DARROW, THOMAS & THOMPSON and DOUGLASS C. GREGG, attorneys for plaintiff in error.

CLYDE E. MARSH, attorney for defendants in error; Dow, WALKER, WALKER & MARSH, of counsel.

MR. JUSTICE SHEPARD delivered the opinion of the court.

By the original decree in this case the defendants in error were perpetually enjoined by the Superior Court from "using the name 'Allegretti,' or 'Allegretti & Co.,' in the sale of chocolate creams and confectionery in the county of Cook aforesaid, except when such use is coupled with words

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clearly indicating that such goods were manufactured and are sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company."

That decree has been reviewed upon appeal, and affirmed by both this court and the Supreme Court. (Rubel et al. v. Allegretti Chocolate Cream Co., 76 Ill. App. 581; Allegretti et al. v. Allegretti Chocolate Cream Co., 177 Ill. 129.)

This present writ of error is from an order of the Superior Court dismissing, for want of equity, a petition filed by the plaintiff in error asking to have defendants in error adjudged guilty of contempt for alleged violations of such original decree.

The record discloses that the defendants in error have discontinued the use of the name of "Allegretti & Co." in the conduct of their business in Cook county, and have substituted therefor the name of "Allegretti & Rubel," upon their store signs and upon the boxes in which their confectionery is packed and sold. In each case the names of the three individuals composing the firm of defendants in error, viz.: I. A. Rubel, G. Allegretti and B. F. Rubel, are printed (or otherwise placed or stamped) in small letters above the name "Allegretti & Rubel."

Upon an exhibit, contained in the certificate of evidence, of the cover to one of the boxes referred to, the arrangement of names, etc., is as follows:

"I. A. Rubel, G. Allegretti. B. F. Rubel.
ALLEGRETTI & RUBEL,
Delicious
Chocolate Creams."

In such combination the embossed script letters composing the firm name, "Allegretti & Rubel," are about four times as large as the letters composing the names of the individual members of the firm, and can be read, as can also the words "Chocolate Creams," by the use of the naked eyes at about four times as great a distance. It is as to the use of the name of "Allegretti," in connection with the word "Rubel," or otherwise, in the prominent manner

shown by the record in the business of the defendants in error, that the plaintiff in error complains. No words negating that the goods are those of "Ignazio Allegretti, or the Allegretti Chocolate Cream Company," appear upon the packages, as the injunctive order commands shall be clearly shown. Whatever the design of defendants in error may be with regard to the use of such labels, the substance of such use is plainly nothing but artifice and contrivance to evade the injunction. To anybody not wise and wary to an unusual degree the effect of the labels is nothing more nor less than a representation that the confections in the packages are those of "Allegretti's" make.

While it is no doubt true, as held by the Supreme Court in the case cited *supra*, that Giacomo Allegretti and his co-defendants in error should not be, and are not by the decree in question, prohibited from using his name in the business in question, yet under the circumstances that induced them to adopt the same business as had been built up by the plaintiff in error, they may only so use his name "provided (in the language of the Supreme Court) they do so in a manner indicating that their goods are 'manufactured and sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company.'"

The intent and plain purpose of the original decree is that defendants in error shall so use the name "Allegretti," if they use it at all, as not to beguile the public into buying their confectionery under the impression they are buying that of the plaintiff in error. The underlying principle of all the decisions upon the question presented by the record before us is the prevention of imposition and fraud upon the public who may be intending customers.

If the similitude employed by defendants in error is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser, in the exercise of ordinary care and caution in such matters, it is sufficient to give the plaintiff in error a right to the redress asked for—an injury being shown.

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The record shows conclusively that persons desiring the chocolate creams manufactured by the plaintiff in error, and believing they were getting them, were deluded into buying those manufactured by the defendants in error by means of the signs and packages now used by the defendants in error, if not as well, also, by the open statements of the agents of defendants in error.

It is plain, we think, as shown by the record, that the defendants in error continue, through the use in a fraudulent manner of the talismanic word "Allegretti," notwithstanding the injunctive decree, to endeavor to create and foster the impression upon the mind of the public that the chocolate creams dealt in by them are those made by the original Allegretti, now the plaintiff in error.

It is manifestly against the spirit of the injunction that they should do so.

It is well settled that a court of equity will direct and control the use of a man's name, either by himself, or by himself associated with others, in his or their business, so it shall not be used to work an injury to the business of another person having the same name, or to perpetrate imposition and fraud upon the public.

The original order of injunction, the violation of which is here complained of, is broad enough to cover the specific acts alleged in the petition and proven in the case, and the denial of the relief asked was error. It is not within our province, sitting only as a court of review, to indicate what other acts than those here shown will constitute a violation of the injunction, or in just what manner the defendants in error may use the word "Allegretti" in their business without violating the injunction. It devolves upon the court below, in the first instance, to appropriately protect its order, which the highest authority of the State has approved of, and upon proper application to see that it is effectively enforced, to the end that defendants in error shall not so use the name "Allegretti" in any way in Cook county as to delude the public in the belief that their goods are those of the plaintiff in error.

In addition to the Supreme Court opinion referred to *supra*, see Fairbank v. R. W. Bell Mfg. Co., 77 Fed. Rep. 869; Baker Co. v. Sanders, 80 Fed. Rep. 889, and Allegretti Chocolate Cream Co. v. Kellar, 85 Fed. Rep. 643, and cases therein referred to.

The decretal order of the Superior Court dismissing the petition of the plaintiff in error for want of equity, is reversed and the cause remanded with directions to that court to proceed under the petition and the answer thereto in such manner as to it may seem to be equitable and just, not inconsistent with this opinion. Reversed and remanded with directions.

Allegretti Chocolate Cream Co. v. B. F. Rubel et al.

1. APPELLATE COURT PRACTICE—*Effect of Failing to Assign Cross-Errors.*—The statute confers upon an appellee or defendant in error authority to assign cross-errors, but it is not imperative, and a failure to do so does not bar the right to prosecute a cross-appeal or writ of error. The common law right to sue out a writ of error upon the same record still remains.

2. RES ADJUDICATA—*Errors Assigned on a Former Hearing.*—If, under the errors assigned upon the record in a former appeal, the questions raised by the errors assigned in this case were presented and considered, the former decision upon such questions must be deemed final.

Bill to Enlarge a Former Decree.—Error to the Superior Court of Cook County: the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1899. Dismissed. Opinion filed January 16, 1900.

DARROW, THOMAS & THOMPSON and DOUGLASS C. GREGG, attorneys for plaintiff in error.

CLYDE E. MARSH, attorney for defendants in error; DOW, WALKER, WALKER & MARSH, of counsel.

MR. JUSTICE FREEMAN delivered the opinion of the court. This is a writ of error sued out by the complainant in

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the original bill, and we are asked to enlarge and broaden the decree entered in its favor by the trial court.

The decree now complained of is as follows:

"This cause coming on to be heard on the bill of complaint herein, answer to defendants and complainant's replication thereto, the court having heard the evidence adduced by complainant and defendants, and arguments of counsel, and being fully advised in the premises, doth find that the equities of said bill are with the complainant; that complainant has a full right and title to the use of the name or word 'Allegretti,' as alleged in said bill; that the material allegations in said bill are true.

"It is therefore ordered, adjudged and decreed by the court that said defendants, B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and each of them, their agents, servants, attorneys, representatives or assigns, be perpetually enjoined and restrained from using the name 'Allegretti' or 'Allegretti & Co.' in the sale of chocolate creams and confectionery in the county of Cook, aforesaid, except when such use is coupled with words clearly indicating that such goods were manufactured and are sold by B. F. Rubel, I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company, and that said complainant do have judgment herein for its costs in this proceeding, to be taxed by the clerk."

Counsel for plaintiff in error thus state the case as it is now presented:

"This case originally came before this court on an appeal by the defendants below, the defendants in error in this case, from the foregoing decree. The decree was sustained by this court (76 Ill. App. 581) and was affirmed by the Supreme Court (177 Ill. 129). By the decisions the facts in this case have been fully found, and the question now is whether under the facts, as found by the courts, the plaintiff in error is under the law entitled to broader relief than the decree gives it. As the facts are fully determined and no error is assigned in that regard, the question is presented now purely as one of law."

It is insisted by counsel for the defendant in error, first, that the plaintiff in error is now attacking its own decree, and that not having assigned any cross-errors upon the original appeal from this same decree, as it ought to have done if dissatisfied therewith, it can not now be heard

to complain; and second, that having failed to so assign cross-errors and attack the decree when it was before under consideration, that decree became *res adjudicata*, and it is too late to seek to have it modified or enlarged.

While the statute confers upon an appellee or defendant in error permission to assign cross-errors, it is not imperative that this shall be done, and the failure to do so does not bar the right to prosecute a cross-appeal or writ of error. The common law right to sue out a writ of error upon the same record still remains. *Page et al. v. The People*, 99 Ill. 418 (424).

If, however, under the errors assigned upon the record in the original appeal, the questions raised by the errors now assigned were presented and considered, the former decision upon such questions must be deemed final.

The errors now assigned are in substance that the decree is not sufficiently broad to afford the plaintiff in error the relief justified by the facts as found; that it was error not to prohibit defendants in error the use of the name "Allegretti" in the conduct of their business; not to prohibit them from using it as the first or prominent name in the firm name as used by them; not to require them to state clearly that they are not the original Allegretti; not to require the use of the first name Giacomo with the surname Allegretti, if the latter is allowed to be used at all, and not to require all the defendants in error to use their full names in connection with Allegretti in the firm name if Giacomo Allegretti's name is to be used at all.

As to the assignment of error to the effect that the defendants in error should have been forbidden the use of the name Allegretti, the point was argued upon the former appeal and considered in the opinions of this and the Supreme Court above referred to. It is said in the latter opinion (*Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill., on p. 133):

"Appellants are not restricted from the use of the name 'Allegretti' in every manner, as is contended by counsel. They may use it provided they do so in a manner indicating that their goods are manufactured and sold by B. F. Rubel,

I. A. Rubel and Giacomo Allegretti, and not by Ignazio Allegretti or the Allegretti Chocolate Cream Company. Fraud and deception having been practiced by appellants, as shown by the facts and the finding herein, we are satisfied the language of the decree is not too broad."

We are of the opinion, however, that the language of the decree is sufficiently broad to give to plaintiff in error practically all the relief it now seeks. The defendants in error are by the decree required, if they use the word "Allegretti, 'to couple it' with words clearly indicating that such goods were manufactured and are sold" by them, and not by plaintiff in error. Any such use of the name Allegretti as tends to perpetuate the fraud and deception heretofore practiced by them is a disobedience of the decree. If the name "Allegretti" is so used, whether as the first or prominent name of the firm composed of the defendants in error, or without a clear statement that they are not the original Allegretti, or without the use of the Christian name Giacomo, or otherwise, if the effect is to deceive the public and lead the buyer to suppose, or permit him to suppose, that he is buying the chocolate creams known as those of the original "Allegretti," then the defendants in error are guilty of disobedience of the decree, and are liable to punishment accordingly.

We have held that they are so liable in another cause between the same parties, and with the same title in which the opinion is also filed at this term, to which reference may be had. 86 Ill. App. *ante*.

For the reasons indicated the present writ of error will be dismissed.

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Young Women's Christian Association v. The International Committee of Young Women's Christian Associations.

1. **TRADE NAMES**—*Right of a Person to Use His Own Name.*—A person can not be entirely prohibited from using his own name as a trade name in any lawful occupation, but he can be restrained from using it in such

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a manner as to perpetuate a fraud upon the public or to injure another person of the same name.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 30, 1900.

CHARLES E. POPE, attorney for appellant.

Under the laws of the State of Illinois no corporation can adopt either the name of another existing corporation or a name liable to be mistaken for the name of said existing corporation. *Starr & Curtis' Stats.*, Vol. 1, Ch. 32, Secs. 2, 53; *The Elgin Butter Co. v. The Elgin Creamery Co.*, 155 Ill. 127; *Illinois Watch Co. v. Pearson et al.*, 140 Ill. 423; *Hazelton B. Co. v. Tripod B. Co. et al.*, 142 Ill. 494; *The Drummond Tobacco Co. v. Charles H. Randle et al.*, 114 Ill. 412; *Sykes v. The People*, 132 Ill. 32, 42; *Presby. Church of Harrisburg*, 2 Grant's Cases, 240; *Holmes, Booth & Haydens v. Holmes B. & Mfg. Co.*, 37 Conn. 278; *Howard v. Henriques et al.*, 3 Sand. (N. Y. Sup. Ct.) 725; *In re Sons of Progress*, 14 Weekly Notes of Cases, 31; *F. L. & T. Co. v. F. & T. Co. of Kansas*, 21 Abbott N. C., 104; *U. S. Mercantile Reporting Agency v. U. S. Mercantile & Reporting Association*, 21 Abb. N. C. 115; *Accident Insurance Co. v. Accident, Disease & Gen. Insurance Corporation*, 51 L. T. Rep. (N. S.) 597; *Guardian F. and L. Ins. Co. v. The G. & Gen. Ins. Co.*, 50 L. J. Rep. 253; *Hendricks v. Montague*, 17 L. R., Ch. Div. 638; *Merchant Banking Company of London v. Merchants Joint Stock Co.*, 9 L. R., Ch. Div. 560; *International Trust Co. v. International L. & T. Co.*, 153 Mass. 271; *In re U. S. Mercantile R. & C. Agency*, 115 N. Y. 176; *The State, etc., McGrath*, 92 Mo. 355.

In considering this question, it is immaterial what the moral intent, or rather immoral intent, of the defendant or its officers may have been. The unfair appropriation or act is what is enjoined. Every one is responsible for the reasonable consequences of his acts. *Holmes, Booth & Haydens v. Holmes, B. & H. Co.*, 37 Com. 278; *Farmers Loan & Trust Co. v. Farmers Loan & Trust Co. of Kansas*,

21 Abb. New Cases, 104, 109, 110; *Hendricks v. Montague*, T. 17 L. R., Ch. Div. 638.

If intent be material, the mere adoption of a similar name is sufficient to show the intent. The law will impute intent to deceive and mislead from the mere similarity of name, as well as from other circumstances and evidence in the case. *Farmers, etc., Trust Co. v. Farmers, etc., T. Co. of Kansas*, 21 Abbott's New Cases, 104; *U. S. Mercantile Reporting Co. v. U. S. Mercantile Reporting Ass'n*, 21 Abb. New Cases, 115, 117; *Accident Ins. Co. v. Accident, Disease & Gen. Ins. Corporation*, 51 Law Times Rep. (N. S.) 597; *The Guardian Fire & Life Assn. Co. v. The Guardian & General Ins. Co.*, 50 L. J. R. Ch. 253; *Russia Cement Co. v. Le Page*, 147 Mass. 206; *Higgins Co. v. Higgins Soap Co.*, 144 N. Y. 462; *Nokes v. Mueller*, 72 Ill. App. 434; *Merchants Detective Association v. Detective Mercantile Agency*, 25 Ill. App. 250; *Boston Diatite Co. v. Florence Manufacturing Co.*, 114 Mass. 69; *Van Auken Steam Co. v. Van Auken Steam Specialty Co.*, 57 Ill. App. 241, 242; *Hendricks v. Montague*, 17 L. R., Ch. Div. 638.

Actual injury by the similarity of names is not necessary. It is sufficient if the public would be likely to be deceived. The very object of an injunction is to prevent what may happen. *Mossler v. Jacobs*, 66 Ill. App. 571.

BENTLEY & BURLING, attorneys for appellee.

Analogy between trade-marks and corporate names stated. See *Boone on Corporations*, Sec. 32.

Trade-marks are recognized as a means of pecuniary profit only. *Day v. Brownrig*, 10 Ch. D. 294; *Street v. Union Bank of Spain and England*, 30 Ch. D. 156; *Clark v. Freeman*, 17 L. J., Part I, 142.

No question of pecuniary profits involved.

Only the first user of a trade-mark is entitled to protection. *McLean v. Fleming*, 96 U. S. 245; *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51; *Selchow v. Baker*, 93 N. Y. 59; *Wolfe v. Goulard*, 18 How. Pr. 64; *Bouvier*, tit. "Trade-mark."

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Claim of complainant that its affiliation with first user, gives it the same rights as first user refuted. See *Hygeia Water Ice Co. v. New York Hygeia Ice Co., Limited*, 19 N. Y. Sup. 602.

Descriptive words can not be appropriated as a trade-mark. *Amoskeag Co. v. Trainer*, 101 U. S. 51; *Caswell v. Davis*, 58 N. Y. 223; *Rumford Chemical Works v. Muth*, 35 Fed. Rep. 524; *Stokes v. Allen*, 56 Hun, 526; *Fay v. Fay* (N. J.), 4 Central R. 241; *Selchow v. Baker*, 93 N. Y. 59; *Bolander v. Peterson*, 136 Ill. 215; *Browne on Trade-marks*, 229 and 232; *Burgess v. Burgess*, 17 Eng. L. & Eq. 260; *Bininger v. Wattles*, 28 How. Pr. 206; *Koehler v. Sanders*, 122 N. Y. 65; *Trask Fish Co. v. Wooster*, 28 Mo. App. 408; *Browne on Trade-marks*, 145-6; *Choynski v. Allen*, 39 Cal. 501; *Van Beil v. Prescott*, 46 N. Y. Super. Ct. 542; *Helmbold v. Helmbold Mfg. Co.*, 53 How. Pr. 453.

Resemblance between trade-marks due to the use of descriptive words gives no right of action, see *Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y. Sup. Ct.) 599.

Descriptive words can not be appropriated as part of a corporate name stated and illustrated. *Employers Liability Assurance Corporation v. Employers Liability Insurance Company*, 24 Abb. N. C. 368, 16 N. Y. Sup. 396; *Farmers Loan & Trust Co. v. Farmers Loan & Trust Co. of Kansas*, 21 Abb. N. C., 104; 2 N. Y. Sup. 296; *Australian Mortgage Loan & Finance Co. v. Australian & New Zealand Mortgage Co.*, Weekly Notes for 1880, p. 6; *Colonial Life Assurance Co. v. Home & Colonial Life Assurance Co., Limited*, 33 Beav. 548; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598.

(Analogy of names involved in suit at bar to names of mutual life insurance companies noted.) *Merchants Detective Association v. Detective Mercantile Agency*, 25 Ill. App. 250; *Newby v. Oregon Central R. R. Co.*, Deady, 600.

Descriptive words must not be used by a later corporation with the intent to defraud an earlier corporation. *Meneely v. Meneely*, 62 N. Y. 427; *Knott v. Morgan*, 3 Keen, 215; *Croft v. Day*, 7 Beav. 84; *Lee v. Halley*, L. R.,

5 Ch. App. Cas. 155; *India & China Tea Co. v. Teede*, Weekly Notes for 1871, p. 241; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 528; *Koehler et al. v. Sanders et al.*, 122 N. Y. 65; *Elgin Butter Company v. Elgin Creamery Company*, 155 Ill. 127; *Sebastian on Trade-marks*, 283 and 151.

As to whether defendant in choosing its name was moved by a fraudulent intent toward complainant, examined and answered. *Ottoman Cahvey Company v. Dane*, 95 Ill. 204.

Resemblance of later corporate name to earlier where resemblance is due to use of descriptive words, not prohibited in Illinois. Statutes of Illinois (Starr & Curtis' Ed.), Vol. 1, Ch. 32, Section 2; *Hazelton Boiler Co. v. Hazelton Tripod Boiler Co.*, 142 Ill. 494; Statutes of Illinois (Starr & Curtis' Ed.), Vol. 1, Ch. 32, Section 65; *Illinois Watch Case Co. v. Pearson et al.*, 140 Ill. 423; *Merchants' Detective Association v. Detective Mercantile Agency*, 25 Ill. App. 250; *Drummond Tobacco Co. v. Randle et al.*, 114 Ill. 412.

Claim of complainant that intent is immaterial where resemblance exists, examined and refuted. *Newby v. Oregon Central Ry. Co.*, Deady, 609; *Merchants' Detective Association v. Detective Mercantile Agency*, 25 Ill. App. 250; *In re First Presbyterian Church of Harrisburg*, 2 Grant's Cases, 240; *In re U. S. Merc. Rep. & Coll. Agency*, 115 N. Y. 176; *Holmes, Booth & Haydens v. Holmes, Booth & Atwood Mfg. Co.*, 37 Conn. 278; *Howard v. Henriques*, 3 Sandf. 725; *In re Sons of Progress*, 14 Weekly Notes, 81; *Farmers' Loan & Trust Co. v. Farmers' Loan & Trust Co. of Kansas*, 21 Abb. N. C. 104; *U. S. Merc. Rep. Co. v. U. S. Merc. Rep. & Col. Ass'n*, 21 Abbott's N. C. 115; *Accident Insurance Co., Limited, v. Accident, Disease & General Insurance Corporation, Limited*, 54 L. J. R. Ch. 104; *Guardian Fire & Life Insurance Co. v. Guardian & General Insurance Co., Limited*, 50 L. J. R. Ch., 243; *Hendricks v. Montague*, 50 L. J. R. Ch., 257; *Turton et al. v. Turton et al.*, 58 L. J. R. Ch., 677; *Merchants Banking Co. of London v. Merchants' Joint Stock Bank*, 9 L. R. Ch. D.

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560; *International Trust Co. v. International Loan & Trust Co.*, 153 Mass. 271; *State v. McGrath*, 92 Mo. 355; *Singer Machine Manufacturers v. Wilson*, L. R. (H. L. Cas.), Vol. 3, Part I, p. 376.

As to claim of complainant that mere resemblance of descriptive names proves fraud as against later user, answered. See *Van Auken Steam Company v. Van Auken Steam Specialty Company*, 57 Ill. App. 241; *Mossler v. Jacobs*, 66 Ill. App. 571; *N. K. Fairbank Company v. Swift & Company*, 64 Ill. App. 490; *Bolander v. Peterson*, 136 Ill. 215; *Amoskeag Mfg. Co. v. Spear*, 2 Sand. (N. Y. Sup. Ct.) 599; *Rubel v. Allegretti Chocolate Cream Company*, 76 Ill. App. 589; 177 Ill. 133; *Nokes v. Mueller*, 72 Ill. App. 434; *Lawrence Mfg. Company v. Tennessee Mfg. Company*, 138 U. S. 537; *Sebastian on Trade-marks*, p. 151.

The evidence fails to show any such injury to complainants as justifies an injunction. 1 *High on Injunctions*, p. 9, section 9.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is a bill for an injunction, brought by the appellant against the appellee.

The prayer of the bill is that the appellee, its agents, etc., may be enjoined and restrained from using or soliciting money or funds under the name "International Committee of Young Women's Christian Associations," or any name so similar to the complainant's or in colorable imitation thereof, as to deceive and mislead the public and individuals or corporations into believing that the defendant is really the complainant or a committee or representative of the complainant, and from organizing other associations under names so similar to that of appellant as to deceive and mislead the public, etc.

The appellant is one of a large number of women's associations, either incorporated or unincorporated, that have existed throughout the land for a substantially common purpose for many years, and have operated in their respective local spheres under the name of "Women's Chris-

tian Association," or "Young Women's Christian Association," and that have affiliated with each other since 1881, certainly, and perhaps prior thereto and subsequent to 1871, to a limited extent, through biennial conferences known as the "International Conference of Women's Christian Associations of the United States and British Provinces."

These international conferences are composed of delegates from Women's Christian Associations in the United States and British Provinces, and assemble every two years to discuss and formulate plans for the common interest and guidance of the several affiliated associations, and for the formation of new associations under like names and for like objects.

There does not appear to have ever been any distinction between the names "Women's" and "Young Women's" as applied to such associations, the objects in either case being the same, viz., the promotion of the moral, religious, intellectual and temporal welfare of women, especially women who are dependent upon their own exertions for support, or desire to become so, and the work along such lines has been mostly among young women.

The appellant became incorporated, under the laws of Illinois, in April, 1877, by the name, "The Women's Christian Association," which name was changed, by apt amendment, in October, 1887, to "The Young Women's Christian Association of Chicago."

From the first, the appellant was an affiliated member of and participant in the biennial international conferences above referred to, and, especially, at the sixth of said biennial conferences held in St. Louis in 1881, at which a standing committee was created for the organization and fostering of "Young Women's Christian Associations."

The chartered objects of appellant are as above substantially set forth in general terms, and in effectuation of such purposes, it (among other charitable acts) maintains, in Chicago, two boarding-houses—one of which, upon Michigan Avenue, is large and valuable and is owned by appellant—an employment bureau and free medical dispensary, a

library, etc., and in the course of its work collects and disburses large sums of money annually.

If not, in so many words, specifically alleged and proved, the fair inference from the record is that appellant is mainly enabled to carry on its extensive charity and good work by the aid of contributions of money and other valuable articles from persons who are charitably disposed.

Unlike numerous of the organizations of like name and purposes in other places, appellant has not had any religious or sectarian test as a prerequisite to its voting and managing memberships, other than that of Christian character, although its boards of management have consisted of representative women from almost every evangelical church denomination in Chicago.

At some one or more of the biennial international conferences, the question of applying the so-called "evangelical test" as a prerequisite to representation therein, was more or less pressed and discussed among the individual delegates, or some of them. The question considered was whether the conference should, or not, adopt a resolution that in the future no association should be permitted representation, unless its separate constitution should contain a provision making it a prerequisite to voting and office-holding membership therein, that they should be members in good standing of so-called evangelical churches, viz.:

Churches which, "maintaining the Holy Scriptures to be the only infallible rule of faith and practice, do believe in the Lord Jesus Christ, the only begotten Son of the Father, King of Kings and Lord of Lords, in whom dwelleth the fullness of the Godhead bodily, and who was made sin for us, though knowing no sin, bearing our sins in his own body on the tree, as the only name under Heaven given among men whereby we must be saved from everlasting punishment."

Such test, though discussed informally, was, through the influence of some of the leading members of the conferences, never formally acted upon in the conferences, but was kept out of the body. The result, however, was that sundry persons, who favored such a test, first met in Wis-

consin in 1886 or 1887, and afterward proceeded to procure the incorporation of appellee under the laws of Illinois, in 1891, in order that a central organization might exist in which such test should be applied.

The objects of appellee, as set forth in its incorporation papers are: "The organization and development of Young Women's Christian Associations for the promotion of the physical, social, intellectual and spiritual condition of young women," and its management is vested in a board of managers known and described as the "International Committee."

Since the organization and incorporation of the appellee it has worked in the previously chosen field of the appellant, and has organized in Chicago two associations known and called, respectively, the "North Chicago Young Women's Christian Association" and "West Chicago Young Women's Christian Association."

Mr. Wishard, who seems to have been the leading spirit in the organization of the appellee, testified upon the hearing below, and in responding to an inquiry if the adoption of the "evangelical test" were not the "primal reason" for forming the appellee corporation, said there were two reasons operating to that end—one of which was the necessity of an organization of its kind, and the other was that the organization must be evangelical; and a diligent examination of the record has failed to disclose to us any other necessity or reason.

Whether the principal work of appellee consists in the organization and development of associations, and not in directly administering benefits to young women who require help, leaving such work to the associations it promotes, is not very material for the purposes of this case.

The ultimate aim of its work is exactly the same as that of appellant, viz.: The administering of such benefits either directly or indirectly, and to accomplish that end successfully the appellee is employing the advantages derivable from its use of a name that is in effect undistinguishable, by the casual observer of it, from appellant's name. Noth-

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ing short of investigation would lead even the most careful observer of appellee's name to any conclusion but that appellee is a committee of appellant and the associations with which appellant is affiliated, and in such respect it can not be successfully contended that appellee is not guilty of the practice of legal deceit and imposition in the use of its name; and the inference from a consideration of the whole record is well nigh conclusive that actual deceit is intended. That such is the effect upon the public is abundantly illustrated by examples furnished by the record, if proof of what is so plainly apparent were needed.

Appellee admits the use by appellant of its name for many years prior to the adoption by appellee of its name. The objects and work of both parties being substantially the same, and their sources of support being substantially the same—each being the distributor of charitable contributions by others composing the public—and their field of labor being in common to the extent at least of the city of Chicago, it is practically impossible to separate the one from the other in the public thought and estimation, except by a critical investigation.

Even if we assume that, under the law of Illinois, articles of incorporation were properly issued to appellee by a name so similar to the one under which appellant was previously incorporated, the right of appellee to use such name, in the same kind of business and for like purposes pursued and followed by appellant, does not necessarily follow.

A man, and no less a corporation, may not be entirely prohibited from using his or its proper name in any lawful business or occupation, but he may properly be restrained from so using it in such a manner as to perpetrate a fraud upon the public, and an injury to another of the same name. *Allegretti Chocolate Cream Co. v. Rubel*, 86 Ill. App. 604. *Allegretti v. Allegretti Chocolate Cream Co.*, 177 Ill. 129.

Here the appellant was for years confessedly occupying a great field of charitable work under a name that in a marked degree commanded respect and confidence. Charitably disposed persons knew of the good work in which it

was engaged, and through its name appellant had acquired valuable reputation as a dispenser of gifts to charity.

Into the midst of that work and into the presence of that reputation, the appellee, under the guise of a name that none but the wary investigator might separate from the appellant, has entered, and gone into competition with the appellant.

There can be no objection that appellee may continue to do its work for good, but in law, at least, it may not, in so doing, use a name so like that of the appellant in such manner as that the public shall be deceived and misled into believing that it is the appellant, when such use operates injuriously upon appellant.

We need not repeat the evidence, but the record shows conclusively that the use by appellee of its name in the way it has been and is continued to be used, works such an injury to appellant as the law will relieve against.

Confusion in the proper conduct of its affairs with third persons, and loss of contributions which, except for the use by appellee of a name so similar to that of appellant, would have come to appellant, are sufficient proofs of injury to property and property rights to sustain the allegations of the bill with respect of injury to appellant.

A great array of argument and authority upon a variety of questions not necessary to be treated of by us, can not be permitted to draw us away from the simple question involved and discussed by us.

The injunction asked for should have been allowed, and the decree dismissing appellant's bill and supplemental bill for want of equity is reversed, and the cause is remanded to the Superior Court, with directions to that court to grant a perpetual injunction against appellee in accordance with the prayers of said bill and supplemental bill. Reversed and remanded with directions.

Mathew H. McKillip v. Francis G. Bonynge.

1. *MALA PROHIBITA—Recoveries.*—A recovery may be had for the performance of a service, although such performance is made unlawful by a statute previously enacted, but which does not go into effect until after the service has been performed.

2. *PRESUMPTIONS—From a Common Law Record.*—Where there is no bill of exceptions the court will presume, unless the contrary appears from the common law record, that the proceedings in the case were regular.

Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 18, 1900. Rehearing denied.

Statement.—Appellant, who is a veterinary surgeon, was employed by appellee to perform an operation known as docking upon appellee's horse. By reason of the operation the horse was so injured that it died. Appellee brought this suit to recover damages, alleging that the loss of the horse resulted from negligence and lack of skill upon the part of appellant. To the declaration appellant demurred. The declaration is formal and the only ground of demurrer was that the operation performed by appellant and described in the declaration, is one which is prohibited by the statute. The demurrer was overruled. Upon the overruling of the demurrer an order was entered, which appears in the abstract of record as follows: "Order to plead within ten days." Upon June 27, 1894, which was eleven days after the entry of the order to plead, appellant was defaulted. And on the 24th of May, 1895, a jury was impaneled to assess appellee's damages. Damages were assessed at \$750, and a judgment thereon rendered. Subsequently a motion to vacate the judgment and to set aside the default was denied.

EDMUND FURTHMANN, attorney for appellant.

SIDNEY S. GORHAM, attorney for appellee.

McMurray v. Pullman's Palace Car Co.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

But two questions are presented upon this appeal: First, whether the demurrer to appellee's declaration was properly overruled; and secondly, whether there was error in the assessment of damages.

Upon the first question no other contention is made by appellant except that the statute prohibits the sort of surgical operation which was performed by appellant, and that the claim of appellee can not be maintained for a matter growing out of an unlawful undertaking. It is sufficient to say, in disposing of this contention, that the act alleged in the declaration as the ground of action, is laid at the date of June 3, 1891, and that the statute relied upon was approved upon June 17, 1891, and in force for the first time upon July 1, 1891.

The second contention is based upon an alleged lack of notice to appellant or his counsel of the inquest of damages. Without discussing the necessity of such notice, it is enough to say that the record does not disclose any such lack of notice. There is no bill of exceptions. From all that appears from the common law record we must presume that the proceedings were regular. *Phillips v. Kerr*, 26 Ill. 213; *St. Louis & S. E. Ry. Co. v. Wheelis*, 72 Ill. 538; *Magill v. Brown*, 98 Ill. 235; *Mullen v. The People*, 138 Ill. 606. The judgment is affirmed.

Charles H. McMurray v. Pullman's Palace Car Co.

1. NEGLIGENCE—*Loss of Money by a Passenger*.—The mere proof of loss of money by a passenger, while occupying a berth in a sleeping car, does not make out a *prima facie* case against the company; to sustain a recovery some evidence of negligence on the part of the defendant must be given.

Appeal from the County Court of Cook County; the Hon. EBEN B. GOWER, Judge, presiding. Heard in this court at the March term, 1899. Affirmed. Opinion filed January 18, 1900. Rehearing denied.

Statement by the Court.—Appellant, a traveling salesman for a Chicago business firm, October 29, 1890, intending to go to Anna, Illinois, purchased a ticket on the Illinois Central Railroad, and also a ticket from appellee for a sleeping car. He started from Chicago between eight and nine o'clock P. M. at the last date, having in his card case, which he carried in his pocketbook, \$135. There were two sleepers in the train, but only one conductor for the two sleepers. Appellant took a berth in one of the sleeping cars, and after the conductor had taken up his ticket he went into the smoking room of the car, where there were other persons. Afterward, and while he was in the smoking car, the conductor came there and asked him if he could change a twenty dollar bill. Appellant looked at his money, the conductor standing in the doorway of the smoker, and told him no. When appellant was about to retire for the night, he put his money in his card case, put the card case in his pocketbook, and the pocketbook in his vest, doubled up his vest, and threw it under his pillow in the berth where he slept. He slept in the lower berth. When he awoke in the morning he threw the pillow aside and looked for his pocketbook, but it was gone.

Appellant had traveled more or less for about twelve years on the Illinois Central Railroad, and had, for about seven or eight years next prior to the time in question, passed one or two nights each week in a Pullman sleeper. He says the practice as to keeping watch at night on the Pullman cars was, that the conductor stayed up till three o'clock in the morning, when he went to bed, and the porter of the car then got up. He also testified that the porter is allowed to black shoes for the passengers, and that when he arose in the morning his shoes were "shined."

The case was first tried in a justice's court, and next in the County Court, on appeal from the justice. The judgment was for appellee on each trial. The case was tried in the County Court by the court, without a jury, by agreement of the parties.

LORENZO C. BROOKS, attorney for appellant.

L. E. McPHERSON, attorney for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

"The mere proof of the loss of money by a passenger while occupying a berth, does not make out a *prima facie* case, and to sustain a recovery some evidence of negligence on the part of the defendant must be given." *Carpenter v. N. Y., N. H. & H. R. Co.*, 26 S. E. R. 277.

To the same effect is *Pullman Car Co. v. Smith*, 73 Ill. 360. None of the cases cited by appellant is to the contrary.

It is true, as contended by appellant's counsel, that direct proof of negligence is not necessary; that it may be inferred from facts and circumstances in evidence; but the court, whose province it was, sitting as a jury, to exercise the functions of a jury as to the facts, has found that the facts do not justify the inference that appellant's money was lost by reason of appellee's negligence, and the sole question presented for decision is, whether this finding is manifestly against the evidence. We can not say that it is. On the contrary, we think it sustained by *Pullman Pal. Car Co. v. Smith*, *supra*. The judgment will be affirmed.

Odell Typewriter Co. v. Sears, Roebuck & Co.

1. *SALES—To Agents—Burden of Proof.*—When a sale is made to an agent, the burden of proof, in an action to recover the purchase price from the principal, is upon the seller to show that the agent had authority to bind his principal.

Appeal from the Superior Court of Cook County; the Hon. JESSE HOLDOM, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900. Rehearing denied.

Statement.—The appellant brought this suit to the court below to recover of appellee the sum of \$900, which it was alleged was the contract price of one hundred typewriters

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purchased by appellee of appellant. A jury was waived, the cause submitted to the court and finding entered in favor of appellee. To reverse the judgment entered upon that finding this appeal is prosecuted.

The appellant company is engaged in the manufacture and sale of typewriters, and appellee company is engaged in the mail order business, and advertises goods by means of a catalogue, issued semi-annually.

Foster, a salesman representing appellant, called at the place of business of appellee soliciting trade. He says that he was introduced to F. D. Quinn as being the "buyer of the stationery department and the one who had authority to place orders of that kind." There is no testimony tending to show who made such introduction or statement. A conversation occurred between Foster and Quinn, the result of which was that Quinn stated that he would call and have a further talk with the officers of the typewriter company before placing an order. In this interview a price was given (so Foster testified) of \$9 each for the typewriters.

Subsequently Quinn called at the place of business of appellant company and there saw Mr. Knight, the vice-president of the company. Foster was also present part of the time. Mr. Knight and Mr. Foster testify that an order was then given appellant for 100 typewriters at \$9 each, to be delivered and paid for upon the issuance of appellee's next catalogue, then in preparation. After said interview appellant furnished to appellee material for an advertisement and a cut of the machine to be inserted in appellee's catalogue, and a catalogue was subsequently issued containing the advertisement and cut so furnished by appellant, and thereupon 100 machines were tendered to appellee, who refused to accept and pay for the same.

Between the time of said interview and the tender of said machines, Quinn, on behalf of appellee, ordered, on two different occasions, a typewriter, both of which were furnished by appellant and paid for by appellee in the due course of business, at the price of \$9 each.

DICKLEY, GRAY & MORE, attorneys for appellant.

LOEB & ADLER, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

It must first be determined in this case whether said Quinn was agent for appellee, with authority to place an order for 100 typewriting machines, and if not, then whether appellant had a right to presume, as against appellee, that Quinn had such authority.

Quinn testified that he did not in fact have such authority. No one testified that he had. It can not, therefore, be held, from the testimony in this case, that any such authority existed.

Had appellant a right to presume, from the facts and circumstances shown, and as against appellee, that Quinn had such authority? The evidence does not show that appellant ever had any business dealings with appellee prior to the transaction in question, either through said Quinn or otherwise; or that said Foster or said Knight ever knew, or knew of, said Quinn prior to the interviews with him set out in the above statement; or that Quinn had had dealings of a like nature on behalf of appellee with any other person; or that appellee had ever in any manner held said Quinn out to appellant or elsewhere, as its agent, with authority to make any purchases on its account.

There is no testimony tending to show who introduced Foster to Quinn, or that any person connected with appellee knew of such introduction. Neither does the testimony show that any one connected with the appellee, except said Quinn, ever heard of the order or contract in question, until about the time of the tender of 100 machines by appellant to appellee. The mere fact that Quinn was in the employ of appellee, and that Foster found him there, does not establish authority in Quinn to go to the place of business of appellant and make the alleged contract.

The testimony does not show very clearly the character or mode of conducting the business of appellee. Whether appellee kept in stock goods advertised in its catalog

purchased goods to fill orders as received, or did both, is not definitely shown, although Mr. Knight testified that Mr. Quinn said that appellee did not advertise anything unless they had a complete stock of same on their shelves. The furnishing by appellant of the material for an advertisement, and the publishing of the same in its catalogue by appellee is consistent with either mode of doing such business. It is also consistent with either mode of doing such business for appellee to contract for a definite number or quantity of the goods advertised in its catalogue, or to contract for so many as might be needed to fill such orders as it should receive from time to time. Hence the fact that appellant furnished the material for, and that appellee published, said advertisement, does not necessarily sustain the contention that appellee thereby confirmed an order by said Quinn for a definite number of machines.

As it was consistent with the mode of doing business, such as that conducted by appellee, that said Quinn might be authorized to purchase articles from time to time to fill orders received for goods advertised in said catalogue, it does not follow that he was authorized to contract for the absolute purchase of a quantity of such goods before any advertisement as to the same appeared in said catalogue.

The authority of said Quinn to make said contract as agent of appellee is not established. Neither does it appear that appellee ratified said contract as an absolute purchase of one hundred machines. The fact that said Quinn ordered and paid for two machines, each order being for one machine only, does not strengthen or corroborate the contention of appellant that there was a contract for the absolute sale and purchase of one hundred machines, but rather the contrary.

The judgment of the Superior Court is affirmed.

James Barnett v. Napoleon Barnett, use of, etc.

1. **CHANCERY PRACTICE**—*Decrees Must be Grounded upon the Facts Alleged.*—The facts, upon the finding of which a decree is grounded, must be facts set up by the bill of complaint. If the evidence disproves the case made by the bill, the complainant can not be given a decree upon other grounds disclosed by the proofs, unless the court permits the complainant to amend his bill so as to present the case disclosed by the evidence.

2. **PARTNERSHIP ASSETS**—*In Real Estate of the Firm.*—Where the interest of two copartners in a fund derived from the sale of land belonging to the firm is specifically found by a decree, and such interest is subject to no right which can arise from an accounting or from partnership debts, it can be reached by the partner himself or by his creditors.

Appeal from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed January 4, 1900. Rehearing denied.

Statement.—The Philadelphia and Reading Coal and Iron Co., one of the appellees, filed its creditor's bill against appellee Napoleon Barnett and his wife, Mary J. Barnett, and appellant James Barnett and his wife, Mary L. Barnett. The bill was based upon judgments against Napoleon Barnett and wife. The other appellees came into the cause as judgment creditors also, one by consolidation of another cause and one by cross-bill. The substance of the allegations of the bills and cross-bill of these various judgment creditors, aside from setting up their respective judgments and executions returned thereon, was that Napoleon Barnett and James Barnett had been copartners, and that there were unsettled copartnership accounts; that upon a general accounting between the copartners it would be found that Napoleon was entitled to be paid some amount of money by James; that copartnership funds had been invested in real estate, which was described in the name of James Barnett; that certain of it (also described) was taken in the name of Mary L. Barnett, for the use of the copartners;

that some of the real estate described had been sold and the proceeds appropriated by James Barnett, and that Napoleon, the judgment debtor, was entitled to an accounting therefor. No property of the judgment debtor was sought to be reached except interest in real estate described, or proceeds from real estate sold, also described, and the money due to Napoleon from James upon a general copartnership accounting.

Napoleon Barnett filed his cross-bill, setting up the same allegations as those contained in the original bill of complaint, and also praying for a general accounting by his former copartner.

Upon answer and replication, the bills and cross-bill were referred to a master in chancery to take proofs and report, with conclusions. The master made numerous findings and submitted conclusions of fact and law to the court. The cause came on for hearing upon the master's report, and the exceptions of the parties thereto, and the court entered a decree, approving and confirming the master's report in all things, except as to a part of the report which finds that there is any interest in Napoleon Barnett in certain real estate described in the bill as owned by Mary L. Barnett, and claimed to have been purchased with partnership funds, as to which finding the master's report was overruled. The conclusions confirmed by the decree were substantially, that the complainants were entitled to \$2,300 from appellant on account of one-half the purchase price of lot 12, in block 1, in Channing Sweet's subdivision, sold to Thomas H. Watson, September 18, 1891, with interest from date of sale; that said lot 12, block 1, Channing Sweet's subdivision, was purchased with partnership funds; that it is impossible on the evidence to state a general account of the copartnership, and that such accounting is barred by the statute of limitations; that Napoleon Barnett has no interest, legal or equitable, in any real estate mentioned in bills or cross-bill.

Lot 12, described in the master's report and in the decree as the property from sale of which the fund reached by the

decree was derived, is not described either in bills or cross-bill.

From the decree this appeal is prosecuted.

JOHN W. WALSH, solicitor for appellant.

BENTLEY & BURLING, solicitors for appellees; ULLMANN & HACKER and HURLEY & KOERNER, of counsel.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

It is contended by counsel for appellant that the decree is erroneous because, first, the interest of a copartner in any part of the copartnership property can not be determined until the debts of the copartnership are paid and the accounts between the partners are settled; and secondly, that the rights of Napoleon Barnett to the property in question, which rights are sought to be reached by his creditors, are barred and can not be enforced by him or by them, because an accounting which is essential to the determination of such rights is barred by the statute of limitations.

The answer to each contention is, that it appears conclusively from this record that the accounts of the copartners, as between themselves, have been settled; that all copartnership debts have been paid, and that the copartners are simply *cestuis que trust* in relation to the fund derived from sale of the property by Mary L. Barnett, who held title to and sold the same merely as a trustee for their use.

The findings of facts in the decree, which are conclusive here, as no certificate of the evidence is presented, are as follows:

Finds that a copartnership existed between Napoleon Barnett and James Barnett from July 1, 1875, until May 1, 1885, when it was ended; that on May 23, 1891, a full settlement of all partnership accounts was made by and between the partners, except as to certain real estate then standing in the name of Mary L. Barnett, known and

described as follows: Lot 12, block 1, in Channing Sweet's subdivision of, etc., in Chicago, Cook county, Illinois, which said lot was on the 18th of September, 1891, sold and conveyed to one Thomas H. Watson, a *bona fide* purchaser, for valuable consideration, without notice, for \$4,600, which was paid to and used by defendant James Barnett, and no account thereof rendered to his copartner, the defendant Napoleon Barnett; further finds that the defendant Napoleon Barnett is entitled to one-half of the purchase price paid for said lot 12 hereinbefore above set forth, and sold to said Thomas H. Watson, to wit, the sum of \$2,300 with interest at the rate of five per cent from the 18th of September, 1891.

The court further finds that with the exception of the lot above mentioned, the said defendant Napoleon Barnett has no interest of any kind whatsoever in the pieces and parcels of land in said bills of complaint and cross-bills mentioned, and that a general account between the said defendants, James and Napoleon Barnett, as copartners, can not be stated, and if the same could be stated, it is barred by the statute of limitations and by the settlement made May 23, 1891.

From these findings of the decree, it appears, and in the absence of a certificate of the evidence, can not be questioned, that there could be no further accounting between the copartners, as well because there had been a complete accounting on May 23, 1891, as because of the bar of the statute. There being no further accounting possible or necessary, and there being no unpaid debts of the firm, it is difficult to see how the proposition contended for and first above noted can govern. The interest of each of the two copartners in the fund derived from the land is found by the decree to be a one-half interest. Such interest is subject to no right which could arise from an accounting or from partnership debts. Hence it would seem that the interest of Napoleon Barnett could be reached by himself or, in this proceeding, by his creditors. *Smith v. Ramsey*, 6 Ill. 373; *King v. Hamilton*, 16 Ill. 190; *Strong v. Lord*,

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107 Ill. 25; Van Buskirk v. Van Buskirk, 148 Ill. 9; Galbraith v. Tracy, 153 Ill. 54.

Upon the facts, therefore, as found by this decree, the complainant would seem to be clearly entitled to relief. But another and more serious question arises upon the pleadings. It is urged by counsel for appellant that the relief granted is not warranted by the allegations of bill of complaint or cross-bill, and that the facts as found, and which are the basis of the ordering part of the decree, are variant from the facts alleged in the pleadings. We see no escape from the force of this contention. The bill of complaint and cross-bill each allege an unsettled copartnership and each prays for a general accounting. The decree finds that there has been a general accounting, and this finding of the decree is essential to the relief granted. The bills and cross-bills allege interest of Napoleon Barnett in certain real estate described in each. The decree finds that Napoleon Barnett has no interest whatever in any of the real estate thus described, but does find an interest in other property not mentioned in bill or cross-bill. This latter discrepancy can hardly be regarded as covered by any general allegation of the bill or cross-bill as to property in general in which Napoleon Barnett is alleged to have an interest, for the only property interests thus generally alleged are such amounts as might be found due upon a general partnership accounting. By the decree it is found that nothing is due upon a general partnership accounting, but that Napoleon Barnett, the judgment debtor, has a fixed interest as *cestui que trust* in the fund derived from sale of land, which land was equitably the property of himself and James.

Where the facts seem to warrant the relief granted and substantial justice appears to have been done, the inclination is strong to approve the result. But the rule in this State is inflexible that the facts, upon the finding of which the decree is grounded, must be facts set up by the bill of complaint. "If the evidence disproves the case made by the bill, the complainant can not be given a decree upon other grounds disclosed by the proofs, unless the court permits

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the complainant to amend his bill so as to present the case disclosed by the evidence." *Dorn v. Geuder*, 171 Ill. 362, and cases therein cited.

Nor do we regard it as controlling that the abstract of the record fails to show that the attention of the learned chancellor who entered the decree was called to the discrepancy.

In *Dorn v. Farr*, 79 Ill. App. 226, affirmed in 179 Ill. 110, and in *Dorn v. Bissell*, 79 Ill. App. 656, affirmed in 180 Ill. 73, the variance relied upon was not disclosed upon mere inspection of the bill of complaint and decree. It was held in these cases that if the variance was not insisted upon in the court below it could not be relied upon in review. But here the variance is apparent upon the record in that the bill of complaint alleges and relies upon an unsettled copartnership, while the decree finds, as a matter essential to relief, a complete settlement of the copartnership accounts, and the decree grants relief in disposing of property not sought to be reached by any allegation, specific or general, of the bill of complaint.

The decree must be reversed and the cause remanded, in order that the appellees may, if they see fit, so amend their bill of complaint or cross-bill as to correspond with the facts.

The decree is reversed and the cause is remanded.

86	630
197	1465

Edwin Hancock v. American Bonding & Trust Co.

1. *RECEIVER—When to be Appointed.*—As a general rule a receiver should never be appointed unless it is apparent from the showing made that there is danger of the property which is the subject of the litigation being dissipated or placed beyond the jurisdiction of the court, or in some way involved by transfers or conveyances, or of its being subjected to other claims so as to render it more difficult for the court to give and enforce the final relief to which the complainant may be found to be entitled.

2. *SAME—Appointment of—Notice—Practice.*—The objection that a receiver has been appointed without notice is not tenable where the defendant upon his motion to discharge the receiver before an appeal

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has had a hearing which served all the purposes of a notice in the first instance.

3. *SAME—Fraud and Disregard of an Injunction.*—Fraud, or an effort to violate or disregard the injunction of the court, is ground for the appointment of a receiver.

Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the October term, 1899. Affirmed. Opinion filed January 18, 1900. Rehearing denied.

GILBERT & FELL, attorneys for appellant.

PAM, CALHOUN & GLENNON, attorneys for appellee.

MR. JUSTICE WINDES delivered the opinion of the court.

Appellant has prosecuted this appeal from an order of the Circuit Court extending a receivership to certain real estate described in a supplemental bill and the rents thereof. The original bill was filed in the case February 8, 1899, by appellee, on which, after being amended, a receiver was appointed February 18, 1899, of certain mortgage bonds of the Merrimac Building Co., owned by Harriet A. Roberts, and directing the receiver to take possession of said bonds, and also directing Roberts to turn over the bonds to the receiver. She prosecuted an appeal from the original order appointing the receiver for the bonds to this court, which resulted, after a hearing before the Branch Appellate Court of this district, in an affirmance, July 11, 1899, of the order. (83 Ill. App. 463.) We refer to the opinion of Mr. Justice Shepard in that case for a statement of the matters alleged in the original bill and amendment. October 11, 1899, appellee filed its supplemental bill, which is sworn to, and alleges in substance, among other things not necessary to be stated, that said Roberts and other defendants in the original bill were, by order of said Circuit Court entered February 8, 1899, and served upon them the same day, enjoined from selling, assigning, conveying, disposing of, or in any way changing the status of said bonds, directly or indirectly; that Roberts violated the injunction by causing certain of the bonds or the proceeds thereof in her possession or in the possession

of Edwin Hancock (the appellant herein) for her use and benefit to be exchanged for the real estate to which the receivership is extended by the order from which this appeal is prosecuted; that she and Hancock had full notice of the injunction and made such exchange for the purpose of violating the terms of the injunction; that said real estate was conveyed to Hancock in exchange for said bonds, or the proceeds of certain of said bonds, which Roberts had prior thereto disposed of, which said bonds or proceeds were at the time held by said Roberts, or by Hancock for her sole use and benefit; that the conveyance and exchange was made by the direction of Roberts and the title of the real estate was placed in the name of Hancock in trust for the sole use and benefit of Roberts, and for the purpose of making said transaction appear *bona fide* and hindering and delaying appellee, and in violation of the terms of the injunction; that Hancock afterward executed certain trust deeds (describing them) on said real estate, with full knowledge of appellee's rights in the bonds for the purpose of further violating said injunction and hindering appellee in the enforcement of its rights as set up in the bill; that Hancock has no right, title or interest in said real estate whatsoever, but holds the same wholly for the use and benefit of Roberts; that the receiver has never been able to procure the possession of said bonds or any of them, and that said real estate so purchased by said bonds or the proceeds thereof, stands in lieu of said bonds. Hancock and other new parties are made defendants to the supplemental bill. There is no allegation that Hancock is insolvent, a non-resident, nor that there is any difficulty in procuring service of process upon him, though by affidavit attached to said supplemental bill it appears that an attachment was issued for said Roberts for failing to appear before the master in chancery and submit to an examination touching the bonds, and that she for five or six months after February 16, 1899, willfully secreted and concealed herself so that neither process of subpoena nor attachment could be served upon her.

Without notice to appellant, October 11, 1899, upon the supplemental bill, the recommendation of the master, the

record and files in the cause and the evidence theretofore taken before the master to whom the cause was referred, the chancellor ordered that the receiver theretofore appointed be appointed receiver of said real estate and forthwith take possession of it, and proceed to rent the same and pay taxes, etc., thereon, and also that all persons in possession thereof forthwith attorn to the receiver and pay rent to it.

October 31, 1899, the motion of defendants to discharge the receiver was denied, and thereafter an appeal was taken from the order of October 11, 1899.

It is contended by appellant that the chancellor erred, first, in appointing the receiver without notice, and second, without any allegation that appellant was insolvent or a non-resident, or that service of notice or process on appellant could not be made.

The first contention is not tenable for the reason that appellant, upon his motion to discharge the receiver, made and heard before this appeal, has had a hearing which served all the purposes of a notice in the first instance. *Brown v. Luehrs*, 79 Ill. 581; *O'Kane v. West E. D. G. Store*, 72 Ill. App. 299; *Cook Co. Brick Co. v. Kaehler*, 83 Ill. App. 453.

Second. The lack of allegations in the supplemental bill that appellant was insolvent or non-resident, or that service of notice or process upon him could not be made, are not, in our opinion, sufficient reason for the reversal of the decree extending the receivership to the land. It may be that, strictly speaking, the rights of appellee might have been protected by the service of process of summons upon appellant, thus making a *lis pendens* as to any person to whom he might have conveyed the real estate thereafter; but inasmuch as we are to determine the question alone from the sworn allegations of the supplemental bill, which must be taken, for the purposes of this hearing, to be true, we are not prepared to hold that there was such abuse of discretion in the extension of the receivership to the land as would justify a reversal of the order in that regard. The general rule no doubt is, subject to few exceptions,

that a receiver should never be appointed unless it is apparent to the chancellor from the showing made that there is danger that the property which is the subject of the litigation is liable to be dissipated or placed beyond the jurisdiction of the court, or in some way involved by transfers or conveyances, or by its being subjected to other claims, so as to render it more difficult for the court to give and enforce the final relief to which the complainant may be found to be entitled. We are of opinion that the facts shown in this record constitute an exception to the general rule.

Under the original bill the receiver was appointed for the purpose of and directed to take possession of the bonds above mentioned, and said Roberts, in whose possession the bonds were, was ordered to turn them over to the receiver, which she failed and refused to do, and persistently eluded for a long period the service of process of subpoena and attachment upon her, and in the meantime disposed of said bonds and exchanged the same, or the proceeds thereof, for the real estate in question, which she caused to be conveyed to appellant for her sole use and benefit. It also appears from the allegations of the supplemental bill that appellant has no right, title or interest in said real estate, or any part thereof, and that the conveyance of the same to him was made for the purpose of violating the injunction which prohibited said Roberts from selling, assigning or disposing of said bonds, or in any way changing the status thereof, directly or indirectly, and for the purpose of hindering and delaying appellee in the enforcement of its rights. This being so, the real estate stands in lieu of the bonds for which the receiver had been appointed. The order of appointment on appeal to this court has been affirmed, and its correctness is not now in question. Appellant, as we have seen, took the conveyance of this real estate with notice of the injunction, for the purpose of violating it and hindering appellee from the enforcement of its rights, and in so doing, under the facts above stated, was guilty of a fraud. At least, it is an attempt to defeat the process and orders of the court. It was unnecessary under this state of

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facts to allege that appellant was insolvent or a non-resident, or that service of notice or process could not be had upon him. He had no rights, and should not be permitted to thus assist said Roberts to evade the effect of and render nugatory the order of receivership as to the bonds. Fraud, or an effort to violate or disregard the injunction of the court, is ground for the appointment of a receiver. High on Receivers, Sec. 106; Brick Co. v. Robinson, 55 Md. 410-18; Latham v. Chafee, 7 Fed. Rep. 525-8; West v. Swan, 3 Ed. Ch. 420; Baker v. Backus, 32 Ill. 79-115.

The order of the Circuit Court is therefore affirmed.

M. C. Ward v. J. C. Earl.

1. **FIXTURES—Made by Contract.**—While parties can not, by contract, make personal property real or personal at will, yet where an article, personal in its nature, is so attached to the realty that it can be removed without material injury to it or the realty, the intention with which it is attached will govern.

2. **SAME—What is—Rule for Determining.**—Whether a structure is a fixture depends upon the nature and character of the act by which such structure is put in its place, the policy of the law connected with its purpose, and the intent of those concerned in the act.

3. **SAME—Intention of the Parties.**—The intention of the party making the annexation is the chief element to be considered in determining what are fixtures.

4. **SAME—Right of the Tenant to Carry Away.**—A tenant, whether for life, for years or at will, is permitted to carry away all such fixtures of a chattel nature as he has erected upon the demised premises for the purpose of ornament, domestic convenience or to carry on trade; provided such removal can be effected without material injury to the freehold.

5. **SAME—Right of an Assignee.**—An assignee of the lease and purchaser of the fixtures from the tenant, acquires the right of the tenant to remove them, if such removal can be effected without material injury to the realty.

Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in this court at the October term, 1899. Reversed. Opinion filed January 18, 1900. Rehearing denied.

Statement by the Court.—This is an appeal from a judgment in favor of appellee and against appellant for the sum of \$175, rendered on appeal from the judgment of a justice of the peace.

The main facts are as follows: February 1, 1890, appellee, by written indenture of that date, demised to Roberts & Company the brick store and basement known as number 410 Sixty-third street, in the city of Chicago, from February 1, 1890, until April 30, 1895. The lessees, after taking possession of the premises, put in certain structures for the purpose of their business, and occupied the premises until some time in 1892, when they assigned their lease and sold all their interest in the premises to one Martin Henry. Henry occupied the premises until November 12, 1894, when he assigned the lease and sold the stock and fixtures to appellant Ward and one Harness, his partner, who went into possession, and subsequently, in February, 1895, before the expiration of the lease, removed from the premises, taking with them what they claimed to be fixtures, which will be more particularly described hereafter. Appellee recognized the assignments to Martin Henry and appellant Ward and collected rent from each of them as his tenant.

The store or room demised was in dimensions twenty by fifty feet. Roberts & Company, while they occupied the premises, put in what the witnesses improperly call wainscoting, but which appears from appellee's testimony to have been plain sheeting. The sheeting extended from twenty-three to twenty-five feet back from the front of the room and from the floor to the ceiling, both sheeting and ceiling being Georgia pine finished in oil. The sheeting was put on by first nailing three strips to each wall and then nailing the sheeting to the strips, leaving a space between the sheeting and the wall. At the floor and ceiling the sheeting was secured by quarter round strips. An office of Georgia pine finished in oil, which is not otherwise described in the evidence, was attached, as appellee testified, to the wainscoting and to the ceiling by a quarter round. A cold storage room was also put in the room by Roberts & Co., twelve feet in width

by fourteen feet in depth, and from ten to twelve feet in height, having three glass doors in front and a door on the side. It had double walls, with a space six or eight inches between the walls, as is usual in an ice box or cold storage room. It was constructed in the room from lumber brought there; strips two by four inches were nailed to the wall and floor, and it was built against them and on posts nailed to the floor. It was, as described by appellee, a large ice box, constructed and attached as above stated. Between the cold storage room and the wall opposite it, there was a partition of Georgia pine finished in oil, which extended from floor to ceiling, with a door in it. All the structures above described were placed in the room by Roberts & Co., the original lessees, without any expense of appellee. Appellee testified that when appellant and his partner vacated the premises, they removed the partition, the sheeting, cold storage room and office; that where the sheeting was pried off, and where the cold storage room was attached to the wall, considerable plastering was torn off.

Q. "How much?" A. "Well, there was a space seven feet long and two or three inches wide, and in several places all along the walls."

He also testified that in removing the two by fours, where they were nailed to the floor, the floor was splintered. On cross-examination appellee testified the damage to the plastering could have been repaired with two or three buckets of plaster and the labor of one man for two or three hours. Breckenridge, a witness for appellee, and who helped to take out the structures in question, testified that the plastering was torn out in places two or three inches wide, some of such places being eighteen or twenty inches long. Wheeler, appellee's attorney, also testified as to the damage to the plastering, his testimony not differing materially from that of the last witness. In taking the cold storage room out it was sawed in four pieces, the sections running at right angles, and was removed to another place by appellant and his partner and there used.

Appellee testified that the value of the cold storage room,

or box, as it stood in the building, was \$150, and that the value of the wainscoting and office, to remove, would be merely its value as kindling wood; also that he did not restore any of the removed structures, because he rented the building for another purpose, and did not require them.

Louden, an architect, called by appellee, testified that he had heard the testimony describing the sheeting and cold storage room, and was familiar with the cost of such; that the value of the sheeting and office was about \$60, and the value of the cold storage room about \$175 to \$200.

SAMUEL CLARK, attorney for appellant.

WHEELER & SILBER, attorneys for appellee.

MR. JUSTICE ADAMS delivered the opinion of the court.

It is contended by appellant's counsel that the structures removed by appellant were trade fixtures which he had purchased from Henry, the former tenant, who had purchased them from Roberts & Co., who put them in the premises, and that, appellant having removed them while in possession as tenant of appellee, and before the expiration of the lease, there can be no recovery. Whether they were trade fixtures is the question mainly contested. That they were placed in the premises for the convenience of Roberts & Co., in carrying on the business of a meat market, in other words, for the purpose of their trade, is substantially admitted by appellee.

In appellee's examination, as a witness, the following occurred :

Q. "It was wainscoted the whole height of the room?"

A. "Yes, sir; you see it was for a meat market, and they hung their meat on that side of the wall, and the meat had damaged the wall, soiled the wall, and that wainscoting was put up to protect it."

Roberts & Co. were engaged in the meat market business. On cross-examination, appellee testified that he knew when the structures described were being put in by Roberts

& Co., and how they were put in, and made no objection, and also knew that they were used by them in their business. That the damage to the floor and plastering occasioned by taking out the structures was not material, is apparent from the evidence. It was so trifling that appellee did not think it of sufficient importance to produce evidence of what it would cost to repair it, or any figures or data by means of which the jury could estimate the pecuniary damage.

In *Secord v. Lane*, 122 Ill. 487, 496, the court say :

“To determine the immovable character of a fixture, three tests are, by the modern authorities, applied, viz. : First, actual annexation to the realty, or something appurtenant thereto; second, application to the use or purpose to which the part of the realty with which it is connected is appropriated; and third, the intention of the parties making the annexation to make a permanent accession to the freehold.”

The court, in the case cited, also say :

“It is not held that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or the realty, the intention with which it is attached will govern.” See also *Hewitt v. Gen. Electric Co.*, 164 Ill. 420, 424, and *Hacker v. Munroe & Son*, 176 Id. 384, 396, to the same effect.

Washburn, discussing fixtures, says :

“The word is used here in its technical sense as ‘something substantially and permanently annexed to the soil,’ though in its nature removable. But the old notion of physical attachment, as the principal test in determining whether a given thing is a fixture or not, may now be regarded as exploded. Whether it is a fixture depends upon the nature and character of the act by which the structure is put in its place, the policy of the law connected with its purpose, and the intent of those concerned in the act. And while courts still refer to the character of the annexation as one element in determining whether an article is a fixture, greater stress is laid upon the nature and adaptation of the article annexed, the uses and purposes to which that part of the building is appropriated at the time the annexation is

made, and the relation of the party making it to the property in question, as settling that a permanent annexation is intended." Washburn on Real Property, 5th Ed., Ch. 1, Sec. 18.

In 8 Am. & Eng. Ency. of Law, p. 44, we find the following in a note: "Many cases hold that the intention of the party making the annexation is the chief element to be considered, in determining what are fixtures," citing numerous cases, the following of which we have examined and find they support the note: Allen v. Mooney, 130 Mass. 155, 157; Taylor v. Collins et al., 51 Wis. 123, 129; Hill v. Sewald, 53 Penn. St. 271; Seeger v. Pettit, 77 Ib. 437; Ottumwa Woolen Mill Co. v. Hawley, 44 Ia. 57; Jones v. Ramsey et al., 3 Ill. App. 303.

In Taylor v. Collins et al., *supra*, the court say:

"This matter of intention is coming to be the main test in such cases, and the matter of physical annexation of comparatively little importance."

The cold storage room, which is nothing more than a large ice box, was admittedly placed in the building for use in the business of Roberts & Co., which business was carrying on a meat market. The premises were demised to them for that purpose, and we think it apparent from the evidence that their intention was not to make it a permanent accession to the freehold. Nor do we think that appellee could have understood that it was so intended. For the general purpose of renting the premises, the cold storage room would have been undesirable, except on the hypothesis that appellee would not lease it for any other use than as a meat market, which is hardly presumable in view of the fact that, after appellant vacated the premises, he demised them for use as a storage room for bicycles, and says he did not require the removed structures. There was not, as already stated, any material damage caused to the premises by the removal of the cold storage structure.

"In modern times the rule is understood to be that upon principles of general policy, a tenant, whether for life, for years, or at will, is permitted to carry away all such fixtures of a chattel nature as he himself has erected upon

the demised premises for the purpose of ornament, domestic convenience or to carry on trade; provided the removal can be effected without material injury to the freehold." Taylor on Landlord and Tenant, 8th Ed., Vol. 2, Sec. 544.

Among numerous articles of which this author says it has been adjudicated that they could be removed, are ice houses, counters or counting rooms nailed to the floor, etc. *Ib.*, Sec. 545. See also *Joslyn v. McCabe*, 46 Wis. 591.

In *C. & A. R. R. Co. v. Goodwin et al.*, 111 Ill. 273, the court say:

"It does not necessarily and invariably follow that structures, or even buildings, placed by one person on the land of another, become a part of the real estate. When they are trade fixtures they are regarded as personal property."

Appellee's counsel object that it was necessary to cut the cold storage room in order to remove it. It appears both by the testimony of appellant and that of Breckinridge, who helped remove the cold storage room, that after its removal it was set up in another building occupied by appellant; and appellee himself testified that appellant and his partner used it after its removal. The fact that it was so bulky that it was necessary to divide it into quarters in order to remove it, could not affect appellant's right of removal. *Park v. Baker*, 7 Allen (Mass.), 78; *Wood's Landlord and Tenant*, 2d Ed., Vol. 2, p. 1227.

Appellee's counsel contends that as neither Roberts & Co. nor Henry asserted right to the fixtures when they vacated, respectively, appellant can not now claim them, citing as authority *Leman v. Best*, 30 Ill. App. 324. That case is not in point. The court say: "The tenancy of the houses had changed several times by expiration of terms and new demises since the fixtures were first put in," etc.

Here there was only a single demise, which had not expired when the fixtures were taken out. Henry, an assignee of the lease and purchaser of the fixtures from Roberts & Co., had title to the fixtures (*Gubbins v. Ayres*, 72 Tenn. 329), and appellant acquired title by purchase from Henry.

We are of opinion that it can not reasonably be held otherwise than that the cold storage room was a trade fixture, and as such removable by the tenant before the expiration of the lease. We are also of opinion that the office, partition and sheeting were trade fixtures, and as such removable by the tenant.

But even though it should be conceded that the sheeting, or wainscoting, as the witnesses call it, was not removable, the judgment can not be sustained. The only structure valued separately by the witnesses is the cold storage room, which appellee testified was worth \$150, and Loudon \$175 to \$200. The verdict of the jury was evidently based on these valuations. Appellee did not testify as to any value of the sheeting as it was in the building, and Loudon, the only other witness as to values, valued the office and sheeting together at the sum of \$60, not stating their values separately, so that no intelligent verdict could be rendered in respect to the sheeting.

Appellee having had the opportunity to prove the pecuniary loss or damage to the floor and wall caused by the removal of the structures, omitted to make such proofs, so that no intelligent verdict could be rendered for such damage. The judgment will be reversed.

Consolidated Perfume Co. v. National Bank.

1. EVIDENCE—*Letters in Answer to Previous Communications.*—A letter received in answer to a previous communication is admissible in evidence without proof of handwriting, and is *prima facie* the letter of the person who purports to sign it.

2. PRESUMPTIONS—*President of a Corporation—Authority to Execute Promissory Notes.*—The president of an incorporated company is presumed to have authority to execute promissory notes.

3. INSTRUCTIONS—*Technical Accuracy.*—An instruction which recites that "if the jury believe," etc., without limiting them to the evidence as the source of their belief, is in this respect technically incorrect, but is not reversible error in this case.

Consolidated Perfume Co. v. National Bank.

Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900.

JAMES TURNOCK, attorney for appellant.

LOWDEN, ESTABROOK & DAVIS and MARTIN T. BALDWIN, attorneys for appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This is a suit brought by National Bank of the Republic, appellee, against Consolidated Perfume Company, appellant, and the Trans-Oceanic Company, to recover on a promissory note for the sum of \$400, signed "Consolidated Perfume Co., per J. Lahmer, Pres." Said note was payable to the order of the Trans-Oceanic Company, and indorsed by said company and S. Franklin. Appellant filed three special pleas and the general issue verified. The first was a verified plea denying execution and delivery of instrument sued on. The second plea denied joint liability, and to this plea a demurrer was sustained. The third plea alleged want of consideration, and denied that plaintiff was a *bona fide* assignee of said note. The defendant, the Trans-Oceanic Company, defaulted. Replication was filed to above pleas except the second.

Appellee had discounted said note for S. Franklin and when it was not paid Franklin paid appellee. The jury rendered a verdict in favor of appellee, and judgment was entered thereon for the amount due upon said note, \$416. To reverse that judgment the case is brought to this court by appeal.

Counsel for appellant presents several alleged errors in his brief.

First. It is urged that the trial court erred in admitting the note sued on in evidence, because the execution of said note was put in issue by verified special plea and its execution was not properly proved.

To prove the execution of said note appellee offered in

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evidence what it is contended is a letter from appellant to said Franklin.* It is upon what purports to be a printed letter-head of appellant. That letter, including the signature, is in typewritten print. Mr. Aronson, financial and office manager for said Franklin, testified that at the time he obtained said note from the Trans-Oceanic Company, the payee therein named, he addressed a letter to appellant, at its regular place of business on Lake street, Chicago, requesting information as to whether said note was good, and that the letter in question was received in reply to his letter to appellant. The original letter, which is bound in with the transcript filed in this court, has every appearance of being genuine. It is, including the printed heading, as follows, viz.:

“THE CONSOLIDATED PERFUME COMPANY,
Chicago, Ill.

Manufacturers of and dealers in all kinds of perfumery, extracts, toilet articles, etc. Introducers and sole manufacturers of the Consolidated Flavoring Powders. The finest flavoring in the world. 96-102 Lake street.

CHICAGO, April 5, 1898.

MR. S. FRANKLIN, 447 S. Morgan street, Chicago:

Dear Sir: Replying to yours of 1st inst., just received, beg to say, the note referred to in your letter is all right.

Respectfully yours,

THE CONSOLIDATED PERFUME CO.

J. LAHMER.”

The testimony was sufficient to justify the admission of said letter in evidence. (Bloom v. State Ins. Co., 62 N. W. Rep. 810, 813 (Iowa, 1895); Norwegian Plow Co. v. Munger, 35 Pac. Rep. 11 (Kas. 1893); C., B. & Q. R. R. Co. v. Roberts, 49 Pac. Rep. 429 (Colo. 1897); Regan v. Smith, 29 S. E. Rep. 759 (Ga. 1897); People's Nat. Bk. v. Geisthardt, 55 Neb. 232, 238; National Acc. Soc. v. Spiro, 78 Fed. Rep. 777; Scofield v. Parlin & Orindorff Co., 61 Fed. Rep. 806.)

The same witness also testified that a few days after said letter was received a man called at the office of witness, who represented himself to be Mr. Lahmer, the party who had

signed the note; that to the best of his (the witness's) recollection, said Lahmer spoke of having received from appellee the letter referred to by this witness as having been sent to appellant; that said Lahmer requested the witness to return said note because it had been improperly disposed of by the party to whom it had been intrusted by appellant, and said that appellee would "have to sue for it."

After said letter had been offered in evidence and the testimony of said Aronson concluded, said note was admitted in evidence. There was no error in admitting in evidence either said letter or said note.

Upon the admission of said note in evidence appellee rested its case and appellant offered no testimony whatever.

Second. At the instance of appellant the court gave to the jury the following two instructions:

"First. The jury are instructed as a matter of law that under the evidence in this case, the fact alone, if you believe it to be a fact, that the indorser, S. Franklin, has paid the amount due upon this note to the National Bank of the Republic, does not discharge the defendant, the Consolidated Perfume Company, the maker, or discharge the maker's liability to the plaintiff in this case.

"Second. The jury are instructed that if they believe that the plaintiff received this note for value, without notice of any claim that the note was issued without any consideration given to the maker, or any other defense, the plaintiff is entitled to recover, regardless of the question as to whether or not the maker did receive any consideration."

It is contended by counsel for appellant that said first instruction is bad, because it assumes a disputed question of fact; that is, that appellant was the maker of the note sued on. The law is as contended by appellant, viz., that it is error for a court to assume as true a disputed question of fact. (*Channon v. Kerber*, 44 Ill. App. 269, 272.) But that rule of law is not applicable to this instruction in this case, for the reason that there is no dispute as to the question of fact assumed. By its plea appellant cast upon appellee the burden of proving the signature to the note. But when appellee has made a *prima facie* case upon that issue and

appellant offers no testimony, there is no dispute as to that question. The evidence is all upon one side of the issue. There being no conflict in the testimony, there was no reversible error in the giving of this instruction. *Gerke v. Fancher*, 158 Ill. 375, 385.

It is also urged that both of said instructions are erroneous because they say to the jury that "if they believe" etc., * * * without limiting the jury to the evidence as the source of their belief. Both of said instructions are in this respect technically incorrect. But "such an instruction may or may not be overlooked, as the merits of the case may appear." *City of Chicago v. Morse*, 33 Ill. App. 62.

There is no evidence whatever offered by appellant, and no theory upon which the jury could have been warranted in finding the issues for the appellant. Appellee was entitled to a verdict. A peremptory instruction directing the jury to find for appellee would have been proper. (*Belinski v. Brand*, 76 Ill. App. 404, 408; *Eden v. Drey*, 75 Ill. App. 102, 106.) Hence the error in said instructions could have done no harm, and therefore giving the same is not a reversible error.

Third. It is urged by counsel for appellant that the amount due upon said note having been paid to appellee by said Franklin, appellee can not maintain this suit. This point is not well taken. The authorities cited by appellant show that it is not.

The judgment of the Superior Court is affirmed.

Frank W. Pettit v. Lillian R. Noll.

1. VERDICTS—*Unsupported by Evidence*.—A judgment founded upon a verdict unsupported by testimony, and in direct opposition to the weight of the evidence, must be reversed.

Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 30, 1900.

 Smith v. Chicago Gen. Ry. Co.

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

No appearance by appellee.

MR. PRESIDING JUSTICE HORTON delivered the opinion of the court.

This suit was brought by appellee to recover from appellant the sum of \$58.37 alleged to be due as commissions on work secured for appellant by appellee. The jury returned a verdict for that amount and the court overruled a motion for a new trial and entered judgment on said verdict. This appeal is prosecuted to reverse that judgment.

There is no appearance in this court by appellee. We have read the abstract of record as well as the brief and argument for appellant. The verdict seems not only unsupported by the testimony, but to be in direct opposition to the weight of evidence. On behalf of appellee there is no witness except herself. Her testimony upon questions essential to be proven, if said verdict is to be sustained, and which she must prove by a preponderance of testimony, is positively denied by appellant, and his version is corroborated by another witness. While the burden of proof is upon the appellee, the preponderance of evidence is clearly with the appellant.

There does not appear to be any necessity for incumbering the records with a detailed review of the testimony.

The judgment of the Superior Court is reversed and the cause remanded.

Joseph Smith v. Chicago General Ry. Co.

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1. NEGLIGENCE—*Ordinarily a Question of Fact.*—While the question of negligence is ordinarily one of fact for the jury, yet, when the inference of negligence necessarily results from the facts detailed in the statement of his case by the plaintiff, it becomes a question of law for the court.

Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900.

TIFFANY BLAKE and DENNIS & RIGBY, attorneys for appellant.

GLENN E. PLUMB, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

This is an appeal from a judgment of the Superior Court sustaining a general demurrer of the defendant (appellee) to the plaintiff's declaration. The plaintiff elected to stand by the declaration, and judgment was entered for the defendant and this appeal prayed and allowed. The declaration alleges that the defendant at the time of the injury was operating by electricity a line of street railway on West Twenty-second street, in Chicago, and the plaintiff was driving a team of horses north on Lawndale avenue, a public thoroughfare in Chicago, crossing Twenty-second street at right angles, and as the plaintiff was approaching the intersection of Twenty-second street and Lawndale avenue he saw a street car, operated by the defendant, approaching said intersection from the east at a high rate of speed, to wit, twelve miles an hour; that said electric car was at such a distance from the intersection of Twenty-second street and Lawndale avenue, at the time when the plaintiff was about to cross defendant's tracks at Twenty-second street, that the car could easily have been stopped or so slackened in speed as to have avoided coming into collision with the plaintiff; and that it was the duty of the defendant, when its servants operating the car saw the plaintiff about to cross said railway, to have slackened the speed of the car, or to have stopped it so as to have avoided collision with the plaintiff; but avers that the defendant so carelessly, negligently and improperly managed said car, by not slackening the speed or stopping it while the plaintiff was, in the exercise of all due care and diligence, crossing Twenty-second street at Lawndale avenue, that the car col-

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lided with the wagon driven by the plaintiff and threw the plaintiff out and upon the ground.

The plaintiff saw the car coming at a high rate of speed, and the legitimate inference from his pleading is that he knew he could not cross the tracks without being struck by the car, unless it should be stopped or slackened in speed, and so knowing he deliberately took the chances.

Under such circumstances may he, as a matter of law, recover? We think the facts stated in the declaration, with their proper inferences, clearly disclose such certain and uncontrovertible contributory negligence by the appellant as precludes a recovery by him. While the question of negligence, either by defendant or plaintiff, is ordinarily one of fact for a jury, yet, when the inference of negligence necessarily results from the statement of his case by a plaintiff, it becomes a question of law for the court. *Chicago & Alton R. R. Co. v. Fisher*, 141 Ill. 614; *Ward v. C. & N. W. Ry. Co.*, 165 Ill. 464.

The judgment of the Superior Court is affirmed.

**Peter C. Dueholm v. Amson Stern, Adolph Arnold,
Herman Arnold and Theo. Arnold, doing business
as A. Stern & Co.**

1. **STATUTE OF FRAUDS—*Contracts Not Within.***—Where there is a new consideration moving from the promisee to the promisor, as where he gives up some lien or security, the superadded consideration makes it a new agreement, for the performance of which no third person is liable, and is not within the statute of frauds.

Appeal from the Superior Court of Cook County; the Hon. AXEL CHYTRAUS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900. Rehearing denied.

JAMES E. WHITE, attorney for appellant.

M. B. AARON and BLUM & BLUM, attorneys for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

The only question we need consider in this case is whether the alleged promise to pay upon which the suit is brought is an original undertaking, based upon a valid consideration or a mere oral promise to pay the debt of another.

Where there is a new consideration moving from the promisee to the promisor, as where he gives up some lien or security, there the superadded consideration makes it a new agreement, for the performance of which no third person is liable, and consequently it is not within the statute of frauds. *Scott v. Thomas*, 1 Scam. 58; *Power v. Rankin*, 114 Ill. 52.

There seems to have been in this case a promise to pay a specific sum in consideration of a forbearance to levy upon property which appellant claimed to have purchased. The property had been found in possession of the judgment debtors, who were its former owners, and there is no reasonable room for doubt that it was, under the circumstances, liable to seizure upon execution at the time the promise was made. It was practically in the officers' possession. In consideration of appellant's giving his check for part of the amount due, and his promise to pay the balance, the levy was abandoned and he was allowed to retain the property which otherwise he would have been deprived of. Whether there was a rightful judgment and execution, under which the property was legally liable to seizure, we need not inquire in this case. There was an execution, regular upon its face. The property was in effect turned over to appellant, in consideration of a check which he afterward stopped payment upon, and of his promise to pay the sum in question. The promise was an original undertaking, and the judgment of the Superior Court is affirmed.

Jacob Glos and Philip Knopf, County Clerk, etc., v. Evanston and North Cook County Building & Loan Association.

1. **TAX SALE—***Bill to Set Aside—By Whom it Will Lie.*—The right to bring a suit for the purpose of setting aside a tax sale, is not confined to the original owner of the land, but may be exercised by a mortgagee, or by any person who can show such an interest in the estate as would have entitled him to redeem.

2. **SAME—***Constitutional Right of Redemption.*—The constitutional right of redemption from all sales of real estate for the non-payment of taxes exists in favor of owners and persons interested in such real estate.

3. **TENDER—***For Taxes Must be Kept Good.*—A tender of money in payment of taxes to the holder of a tax deed, by a party filing a bill to redeem, must be kept good by paying the money into court, when its acceptance is refused.

Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed January 30, 1900.

Statement.—This is an appeal from a decree enjoining the county clerk of Cook county from issuing a tax deed to appellant Glos upon a tax certificate.

The premises upon which the tax certificate was issued were purchased by said appellant at a sale for non-payment of an installment of a special assessment, and general taxes for the succeeding year were subsequently paid. More than ninety days preceding the expiration of the period of redemption, Glos caused notice of the date of said expiration to be served upon one Coel, who was occupying the premises, but no notice was served upon appellee, who is the holder of certain mortgages made by said Coel, which are uncanceled of record, the debt thereby secured being still unpaid. It appears that appellee had been informed, before said period of redemption had expired, that the lot had been sold for non-payment of such assessment and had notified Coel. The latter informed appellee's secretary that

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the assessment had in fact been paid, that the sale was therefore a mistake, and that he, Coel, would see that the correction was made. Appellee seems to have relied on Coel's statement, and did not discover until after the expiration of the period of redemption the true condition of affairs. Efforts to purchase Glos' interest were made without result, the latter demanding a price which appellee considers extortionate.

A motion was made by appellant in the trial court to dissolve the preliminary injunction and denied. A general demurrer to the bill was also overruled, and appellant electing to stand by his demurrer, a decree was entered granting a perpetual injunction against the issue of a tax deed under the certificate of sale in controversy. This decree further finds that upon payment by appellee to appellant of the "sum of twenty-six dollars and ninety-one cents, being the full sum to which said Glos is entitled, the complainant is entitled to the relief as prayed;" and it is recited that the complainant now in open court tenders and offers to said Glos the said sum of \$26.91, which said Glos declines to receive and refuses to accept, denying the right of the complainant to redeem said property.

ENOCH J. PRICE, attorney for appellants.

H. H. C. MILLER and W. S. OPPENHEIM, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is conceded by appellant that appellee, as mortgagee, would be entitled to maintain its bill to be allowed to redeem from the tax sale, provided it had been in possession of the property, or if the land had been vacant and unoccupied. But this is not a mere bill to remove a cloud. The right to bring suit for the purpose of setting aside a tax sale is not confined to the original owner of the land, but may be exercised by a mortgagee, or by any person who can show such an interest in the estate as would have entitled

him to redeem. *Miller v. Cook*, 135 Ill. 190 (203). It is said in that case that the constitutional right of redemption from all sales of real estate for the non-payment of taxes exists in favor of owners and persons interested in such real estate.

We can not agree with appellant that the bill upon its face shows no equity. While it may be that appellant could obtain a valid tax deed as against the owner, notwithstanding the failure to serve the notice required by statute upon the mortgagee, such tax deed would give nevertheless a purely technical as against a meritorious title, at least as against the mortgagee. See *Miller v. Cook*, *supra*, on p. 207, and cases there cited. In the case of *Smith v. Neff*, 123 Ill. 310 (316), the defense was set up by the owner, upon whom notice as to expiration of time of redemption had been served, that the notice was invalid as to him, because not served also upon a mortgagee, whose debt had subsequently been paid and discharged. It is there said :

"It is obvious the owners, and whoever may be included within the phrase, 'persons interested in such real estate,' all come within this clause of the Constitution, and shall have the right at any time within two years to redeem any real estate from a sale for taxes or special assessments—a right of which such owners and parties interested can not be deprived by any action or non-action on the part of the legislature. It is not, however, germane to the present inquiry who may be meant by 'persons interested in such real estate,' as those terms are used in the Constitution, for the reason that no one is here seeking to redeem the real estate involved in this litigation from sale for taxes."

In the case before us, however, that is what is sought to be done, viz., to redeem, by the bill under consideration. The Constitution declares that "the right of redemption from all sales of real estate for the non-payment of taxes * * * shall exist in favor of the owners and persons interested in such real estate for a period of not less than two years from such sales thereof." The owner in the case at bar was duly served with notice and allowed the time of redemption to expire as to him. Not so, however, with the mortgagee, upon whom no notice was served. It is still

entitled, we think, to maintain its right to redemption, a right conferred by the Constitution, and of which it ought not to be deprived, without an opportunity to protect itself upon proper notice.

We are of the opinion, however, that the tender should have been kept good by paying the money into court when its acceptance was refused by appellant. *Crain v. McGoon*, 86 Ill. 431 (434). The decree will therefore be reversed and remanded, with directions to the Circuit Court to require the tender to be made good by depositing in court, for the use of *Glos*, the amount found due, with interest thereon from the date of the entry of the decree, and thereupon to enter a decree not inconsistent with this opinion. Reversed and remanded with directions.

Grace M. Mathews, Executrix, etc., v. Henry B. Mathews, Jr., and Eliza J. Mathews.

1. *CONTRACTS—Different Instruments Executed at the Same Time.*—An agreement and note, made between a father and his son at the same time, must be regarded as constituting one entire contract where the legal effect of it is that the son agrees to pay certain specified monthly payments during the father's life, and the father on his part agrees that the note shall be canceled and the obligation satisfied at his death, if such payments shall have been made.

2. *SETTLEMENT—Unsuccessful Offers of.*—An unsuccessful offer of settlement, which is not accepted, can not be regarded as evidencing a construction of a contract different from that expressed by its terms.

Appeal from the Superior Court of Cook County; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1892. Affirmed. Opinion filed January 30, 1900.

Statement.—This is a suit upon an alleged promissory note, payable to Henry B. Mathews, senior, now deceased, made by his son, Henry B. Mathews, junior, and the wife of the latter, who are appellees herein.

The note in controversy is the last of a series given in

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renewal of the same obligation as each preceding note successively matured, which appellees claim were executed in pursuance of the following contract :

“ CHICAGO, ILLS., March 3, '90.

Received of Henry B. Mathews, Jr., two notes and a contract to run for my life.

In case of my death I have a note or contract that he is to pay me ten dollars per month for life. My son Henry B. Mathews, Jr.

Also a note of five thousand dollars. Interest payable monthly, twenty-five dollars during my life. The interest is all I expect. At my death both or any notes are paid in full. The monthly income is all I want. Same are signed by my son and wife. H. B. MATHEWS.”

The first note of the series, of even date with said contract, is as follows :

“\$5,000.

CHICAGO, ILLS., March 3, 1890.

For value received, we promise to pay H. B. Mathews five thousand dollars two years from date, with interest at 6 per cent, payable monthly, twenty-five dollars every month.

H. B. MATHEWS, JR.

Paid March 5, '92, new note.

ELIZA J. MATHEWS.”

When this note matured according to its terms it was taken up, and there is evidence tending to show that the words “Paid March 5, '92, new note,” appearing at the bottom of said note, are in the handwriting of the payee. Said note was replaced by the second note of the series, which is as follows :

“\$5,000.

CHICAGO, March 5, 1892.

For value received, we promise to pay H. B. Mathews five thousand dollars, with interest at 6 per cent, to run two years. The interest is payable monthly, twenty-five dollars every month.

CHICAGO, Sept. 1, 1894,
paid new note.

H. B. MATHEWS, JR.

ELIZA J. MATHEWS.”

There is testimony tending to show that the words “Chicago, Sept. 1, 1894, paid new note,” were indorsed on said note, as in the case of that preceding, in the handwriting of H. B. Mathews, Sr., the payee. The note was taken up and replaced by the third of the series as follows :

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“\$5,000.

One year after date, for value received, we promise to pay H. B. Mathews five thousand dollars, with interest at 6 per cent. Interest payable monthly.

CHICAGO, ILLS., Sept. 1, 1894. Paid.

H. B. MATHEWS, JR.
ELIZA J. MATHEWS.

Paid Oct. 12, '95.”

The evidence tends to show that the words “Paid Oct. 12, '95,” are like the similar notations upon the previous notes in the handwriting of the payee. The date corresponds with the note now in controversy, which is as follows :

“\$5,000.

Two years after date, for value received, we promise to pay to Henry B. Mathews five thousand dollars, with interest at 6 per cent, payable monthly. This means interest only.

H. B. MATHEWS, JR.
ELIZA J. MATHEWS.

CHICAGO, ILLS., October 12, 1895.”

These notes bear indorsements showing payment of the interest, and it is conceded that the installments have been regularly paid, substantially in accordance with the agreement, up to the time this suit was begun.

It appears that H. B. Mathews, senior, was at the time of the execution of the first of the four notes, and of the contract of March 3, 1890, somewhere in the neighborhood of eighty years of age. For a time he had lived with the appellee, his son; but about two years before his death he became hostile to his said son, because the latter did not approve the father's course with reference to a third person. At the time of his death, in November, 1897, the exact date does not appear in evidence, he was living with appellant, who was his daughter-in-law, the widow of a deceased son.

The present suit was instituted by the father October 13, 1897, about a month before his death.

W. W. WHELOCK and F. M. WILLIAMS, attorneys for appellant.

MANN & MILLER, attorneys for appellees.

MR. JUSTICE FREEMAN delivered the opinion of the court.

It is the claim of appellees that the note sued on is one of a series of notes given for the same five thousand dollars, each of which is covered by, and subject to, the terms of the agreement of March 3, 1890, in the same way and to the same extent as the first note of the series of even date with said contract.

It is contended by appellant, on the contrary, that the alleged contract of March 3, 1890, was annulled by the subsequent notes, and that the latter are inconsistent and irreconcilable therewith. The argument in support of this proposition is that if said agreement of March 3, 1890, was intended to provide that appellees should only pay to H. B. Mathews, Sr., interest upon five thousand dollars during the lifetime of the latter, the first note was sufficient and there was no need of renewing it at its maturity and giving a new note at each expiration of the period named in that preceding; that the giving of each new note must be considered as a recognition of an indebtedness to be discharged by payment.

While it is doubtless true that the original note might have answered the same purpose, the new notes contain nothing to contradict the agreement of March 3, 1890, and there is nothing in the fact that the first note was taken up when, according to its terms, it had matured, to indicate any different purpose from that stated in the contract. The fact rather tends to indicate a continuing purpose to abide by the agreement of March 3, 1890. The father was an aged man. His hold upon life was uncertain. It might readily appear to both parties wiser to renew the contract by new notes from time to time, for short periods. The intention of the parties, as expressed in a written contract, can not be set aside merely because they might have accomplished the same purpose in some other way. Nor is the claim made by appellant's counsel—that an intention to rescind the agreement of March 3, 1890, is shown by giving the new notes successively—borne out by the wording of the note upon which the suit before us has been brought. After

stating the promise to pay the five thousand dollars, with interest at six per cent, payable monthly, there is added, "this means interest only." These words of themselves create a strong impression, at least, that it was the intention of the note to secure payment of "interest only," and in this the note coincides with the evident intention expressed in the agreement of March 3, 1890. Read in the light of that agreement it is scarcely possible to reach any other conclusion than that such was the intention intended to be expressed by the words quoted, an intention faithfully observed by both parties until the time when this suit was brought. This view is further sustained by receipts given in 1896 and 1897, in which occur respectively the expressions: "Ints. my life right;" "being interest on both for life;" "for life;" and one dated July 12, 1897, reads as follows: "Received of H. B. Mathews, Jr., thirty-five dollars. Twenty-five dollars interest on note of \$5,000 and \$10 per month as long as I live. Payable July 12, 1897. H. B. Mathews, Sr."

This receipt, given within four months of the father's death, shows, we think, conclusively, that the son was making and the father receiving payments at that time in accordance with the agreement evidenced by the original document of March 3, 1890, both as to the ten dollars per month and the monthly installments, called interest upon the five thousand dollars, then evidenced by the note now in controversy, upon which the suit at bar is brought.

It is further urged by counsel for appellant that said document of March 3, 1890, could only operate either as a testamentary devise, as a gift *inter vivos* or a gift *causa mortis*, and that it is ineffectual in all these respects.

It may be conceded that the instrument does not operate either as a testamentary devise nor as a gift. *Telford v. Patton*, 144 Ill. 611. It is not so claimed. If it has any force or effect it must be because, together with the note in controversy, it constitutes a valid contract between the father and son.

Counsel for appellant asserts that the said instrument of

h 3, 1890, is ambiguous, but does not point out in what aspect. It certainly appears to express its meaning with sufficient clearness. It states in effect that the father holds notes upon which he expects a specified sum to be paid monthly during his life and nothing more, and that at his death all obligation under such notes will terminate.

The agreement and note made at the same time must be regarded as constituting one entire contract, the legal effect of which is that appellees having agreed to pay the specified monthly payments during the father's life, the father on his part agrees that the note should be thereby canceled and its obligation satisfied. *Bailey v. Cromwell et al.*, 3 Scam. 71; *Davis v. McVickers*, 11 Ill. 327; *Wilson v. Roots*, 119 Ill. 379. As we have stated, we do not regard the successive renewals of the first note as impairing in any respect the force and effect of the original contract. This contract was in full force from the time when it was first made, and binding upon both parties alike.

It is said that certain oral testimony tended to show that the father subsequently made statements showing that the note was not to be considered paid until his death. We do not so understand the testimony, but in any event the plain language of the instrument can not be so interpreted. The words are: "At my death both or any notes are paid in full;" not that the notes are to be paid in full, but that at his death the notes themselves are paid by payment of monthly installments, liability for which then expires, terminating the contract. The true intention, as expressed by the instrument, seems to be that the notes were given for the sole purpose of securing payment of a sum in monthly installments, equal to what the interest would be at the rate stated upon the sum named in the note, during the lifetime of the father.

It appeared from the testimony of one of appellant's attorneys, that just prior to the father's death and before the institution of this suit, when the father entertained ill feeling toward the son, the latter offered to return the five thousand dollars, less some four hundred dollars, which he

claimed his father owed him. The son stated that he so offered "for the sake of a settlement and to make myself right with the old man." Such offer of settlement was not accepted, and under the circumstances can not be regarded as evidencing any construction of the contract different from that expressed by its terms.

It is said that appellant, as executrix, was at least entitled to recover the installment which became due October 12, 1897, during the lifetime of the father, and which was not paid, and that failure to so pay was a breach of the contract by appellees. The day after it became due this suit was begun, not for the installment of twenty-five dollars to which the father was entitled, but for five thousand dollars which he was not entitled to recover. It does not appear that there was any request or demand made for payment of this installment, and there was no refusal to pay it. In fact, the evidence of appellant's counsel, before referred to, shows that the son offered to pay this monthly installment the day it was due, and over four thousand dollars beside. Appellant's counsel refused to receive the payment, because the son would not pay all that was demanded. It is difficult to see upon what ground such refusal could charge the son with a breach of the contract, when he had offered to pay not only the installment which was due, but a large sum beside, for which he was not liable.

It may be that the estate is entitled to this installment, and had the attention of the trial court been called to the matter, the claim might have been allowed. But the point was not specifically made upon the motion for a new trial, as appears from the statement of appellant's counsel in his reply brief, and the motion as made was properly denied.

Other points are presented in the briefs of counsel, but in view of what we have said, we deem it unnecessary to consider them in detail.

The judgment of the Superior Court is affirmed.

Peterson & Co. v. Albert Wachowski.

1. ACCOUNT STATED—*What is—Definition.*—An account stated is an agreed balance of accounts, which has been examined and accepted by the parties to the transaction in question.

Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded. Opinion filed January 30, 1900.

HERBERT S. DUNCOMBE, attorney for appellant.

MAX A. DREZMAL, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

Appellant, S. Peterson, doing business as S. Peterson & Company, appealed to the Circuit Court from a judgment recovered against him in favor of appellee before a justice of the peace, and there suffered again the recovery of a judgment against him for the same amount, and now brings the case to this court for review.

Appellee was engaged as a salesman for appellant, at a compensation equal to a fixed percentage upon the amount of the net profits on all goods sold to customers of his own procuring, by either himself, or others representing the appellant. He rightfully quit such employment December 31, 1895, and on that day requested of appellant a statement of how much was due him. Three days afterward he was furnished by appellant's bookkeeper with an account bearing date January 3, 1896, crediting him with \$110.90 commissions earned by him, and charging him with merchandise and ten per centum of such commissions, and showing a balance of \$99.27 as due to him. The contract under which he worked provided that appellee should bear a percentage, equal to his commission percentage, of all losses, as for bad debts, etc., on goods sold by him, and that ten per centum of his commissions should be retained by appellant

to protect against his share of such losses when ascertained, and the charge against him for ten per centum of his commissions, as shown by such statement of account, was presumably made in pursuance of the contract in such respect. The judgment in favor of appellee was for the balance of \$99.27, shown by the statement furnished him.

It is contended by appellee that the account furnished him was an account stated, and binding upon appellant. On the other hand, appellant insists to the contrary, and urges that the account, as furnished appellee, shows upon its face that it was not a final statement, because it shows a credit to the retention fund of the ten per centum charged to appellee, thus indicating that the business transactions between the parties were not closed, and that in the nature of things, whether there would be losses in which appellee was bound to share could not be ascertained so soon, and before the terms of credit given to customers had expired.

The evidence at the hearing consisted wholly in the writings—the contract and the account furnished appellee—and the testimony of appellee, and of appellant's bookkeeper, who was also shipping clerk, and had charge of the accounts.

By the testimony of the bookkeeper it would appear that losses on bills of goods, sold by appellee prior to his quitting his employment, were ascertained after the rendition of the account claimed to be an account stated, which, if apportioned under the terms of the contract, would more than offset the balance there shown to be due to appellee. No statement of such loss was, however, furnished to appellee until after he had begun this suit—about six months after the account rendered was furnished appellee. On the other hand, this same witness testified to certain facts concerning outstanding accounts of goods sold by appellee, from which, if standing alone, the jury might, perhaps, have found that an additional amount was owing to appellee, and they seem in fact to have done so, although such increased sum was remitted from the verdict.

We can not assent to appellee's contention that the state-

ment furnished to him was equivalent to an account stated, in the legal significance of that term, and, as such, conclusive between the parties to it, except for fraud, mistake or plain error shown.

Bouvier (Law Dictionary) defines an account stated to be: "An agreed balance of accounts. An account which has been examined and accepted by the parties."

It seems that it was the custom between the parties to furnish appellee with a statement soon after the end of each month, showing the commissions earned by him upon sales made by him during the month, and to charge him with ten per cent thereof as a reserve or retention fund to abide the ascertainment, later on, of losses, if any, upon goods so sold, as it was provided by the contract should be done. The goods were not sold for cash, but upon credits of thirty or sixty days, and in the nature of things it could not be known at the end of a month what the percentage of loss would be upon sales the term of credit for which had not expired.

True, the parties might have agreed at the time appellee quit his employment that no part of losses, if any, upon sales for which the term of credit had not expired, should be borne by appellee, and the contract in such respect be abrogated, but there is no evidence of such an agreement.

There is no evidence that appellant ever saw the statement of January 3d after it was made out by the bookkeeper, or that the bookkeeper had any authority to in any respect change or abrogate the provisions of the contract. Nor is there any evidence that appellant and appellee ever agreed upon such statement as being final and correct. The only evidence in such respect is that appellee requested appellant to give him a statement of how much was due him, and that the bookkeeper made out and gave to appellee the account of January 3d.

Such falls far short of being an account stated, binding in law upon the parties. The clear inference is, as testified by the bookkeeper, that it was made and given as a statement for the month of December only, without reference to losses that might be subsequently ascertained. Except

upon the theory that the statement furnished appellee constituted an account stated, which, we hold, is not sustainable under the proof as made, the evidence did not warrant a verdict in favor of appellee.

We expressly refrain from all opinion upon the case as it may be made to appear upon a fuller inquiry into the accounts kept by appellant than was had by appellee under the account stated theory upon which his case was tried. He staked his case below and has done so here upon that theory.

In his brief he says, "the only question in this case is whether the statement * * * was an account stated."

We therefore discuss nothing else, and, it being plainly not such, we are reluctantly (the amount involved being so small) compelled to reverse the judgment and remand the cause for another trial. Reversed and remanded.

**Joseph Downey v. The Chicago Title and Trust Co.,
Assignee, etc.**

1. VOLUNTARY ASSIGNMENTS—*What Passes to the Assignee.*—The assignee of a failing debtor takes the property assigned subject to all equities, liens or incumbrances which existed against it in the hands of the insolvent.

2. SAME—*Priorities—Liens for Rent.*—A clause in a lease providing that "the lessor or his representatives or assigns shall have at all times, the right to distrain from rent due, and shall have a valid and first lien upon all property of the party of the second part, whether exempt by law or not, as security for the payment of the rent" reserved, gives no lien upon after-acquired property of the lessee in the hands of the assignee of the lessee in a case where the landlord has not availed himself of his right to distrain.

Appeal from the County Court of Cook County; the Hon. JOHN H. BATTEN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900.

JOHN M. GARTSIDE, attorney for appellant.

JESSE A. and HENRY R. BALDWIN, attorneys for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

Appellant filed his petition in the County Court asking that appellee, as assignee of an insolvent firm, be required to pay the back rent of the premises occupied by the insolvents for a period of about eleven months prior to the assignment. It is claimed by appellant that he is entitled, as lessor, to priority over all other claims against the estate of said insolvents by virtue of the following clause in the lease :

“And said party of the second part further covenants and agrees that said party of the first part, or the representatives or assigns of said party, shall have at all times, the right to distrain from rent due, and shall have a valid and first lien upon all property of the party of the second part, whether exempt by law or not, as security for the payment of the rent herein reserved.”

Special stress is laid by appellant upon the words “shall have at *all times* the right to distrain,” and upon the provision giving “a valid and first lien upon *all property*” of the lessee. It is claimed the clause is meant to be construed not merely as giving a right to distrain “at all times,” which right the law gives without a contract, but also as giving “at all times” a valid and first lien. The language read in its ordinary acceptation would be construed, no matter how punctuated, to give only the right to distrain “at all times.” If the parties intended to say that the lessor should have at *all times* a valid and first lien upon all property which the lessors then had and might thereafter acquire, they certainly failed to state such intention in express terms.

There is no doubt as to the rule that the assignee of a failing debtor takes the property assigned subject to all equities, liens or incumbrances which existed against it in the hands of the insolvent. *Hoover, etc., Co., v. Burdette*, 153 Ill. 672, and cases there cited. The question is whether the clause in controversy gave appellant a valid and first lien upon all the property, whether after-acquired or not, which the lessees had at the time the assignment was made, as security for the rent then due and unpaid.

Appellant claims that the language of the lease includes

both property on hand at the time the lease was executed and also that after-acquired. In support of this contention the cases of *Eames v. Mayo*, 6 Ill. App. 334, and *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155, are among the cases cited.

In *Eames v. Mayo* it was held that the landlord had a right to distrain upon the goods and chattels referred to in the lease, and distrained while upon the demised premises, regardless of whether the distraint was before or after the record of the assignment. It appears from the statement of the case that the goods and chattels taken were the same upon which the lien was given, and not after-acquired property. In *Link Belt Machinery Co. v. Hughes* it was held that where a receiver *took possession of the premises* and carried on the business under an order of court preserving whatever rights the lessor had, the receiver took the property subject to the same terms and conditions as it was held by the insolvent, and the lessor's lien continued and was transferred to the proceeds arising from the sale of such property and was prior to the claims of creditors and costs.

These cases cited by appellant are not applicable to the cause before us. They are based upon different states of facts and involve different questions of law. *Borden v. Croak*, 131 Ill. 68, is more in point. In that case the lease gave "a right of distress and also a valid and first lien for said rent accruing or to accrue upon the property of the person or persons liable therefor." The words "upon the property" of the tenant, being without qualification, seem to include *all* such property to the same extent as the lease under consideration in the case at bar, in which it is specifically so stated. The opinion of the court in the *Borden* case, there being no evidence that any of the goods upon the proceeds of which the lessor sought to obtain a preference were owned by the lessee at the date of the lease, and the burden of proof being on the lessor, holds that it will be assumed in the absence of such proof that the property was all after-acquired. The question was thus narrowed down

as it is in the case at bar, to whether the provisions of the lease were sufficient to vest in the lessor such lien upon after-acquired property as would enable him to pursue its proceeds, and the court says:

“It can not be said, however, that the language of the lease has any application to after-acquired property. In interpreting the words of an instrument, we should view them from the position, both as to time and circumstances, in which the parties stood when they used them. The lessee, speaking at the date of the lease, of his property, manifestly refers to the ‘property’ he then owned and nothing more. If at that time he had executed an instrument conveying, assigning or mortgaging his ‘property’ without qualifying words, no one would for an instant suppose that he was attempting to dispose of his future acquisitions. How then, can it be said that an instrument by which he attempted to create a lien upon his ‘property,’ without words indicating an intention to subject to the lien his future acquisitions, can have any broader application?”

This language seems to be applicable in all respects to the case at bar. When a party conveys his “property” without modification or limitation, he conveys neither more nor less than all his property, and the word “all” neither adds to nor detracts from the force and meaning of the conveyance. It was further held in the case last cited, that such a contract will not be enforced in equity against subsequently acquired chattels where no chattels are specifically described except by the word “property.”

In *Powell v. Daily*, 163 Ill. 646, the language of the lease gave “a valid and first lien upon any and all goods and chattels and other property belonging” to the lessees. It was held, as in *Borden v. Croak*, that in the absence of proof that any portion of the property held by the assignee was owned by the lessees at the date of the lease, it would be assumed to be all after-acquired property, and that the terms of the lease are ineffectual to create a lien thereon. It is also stated that the landlord has in this State no common law lien, but only the right to distrain. Of this right the landlord had not availed himself in time, the assignee having possession some days before the distress warrant issued. See also *First Nat. Bank v. Adam*, 138 Ill. 483 (501).

VOL. 86.] Connecticut Mutual Life Ins. Co. v. Stinson.

We regard the doctrine of these cases as decisive of the questions before us. The clause in controversy gave no lien upon the property in the hands of the assignee. Here the landlord had taken a judgment note two days before the assignment. Judgment was not entered thereon until nearly a month thereafter. The landlord had not availed himself of his right to distrain, and the execution under his judgment was not issued in apt time.

The judgment of the County Court is affirmed.

Connecticut Mutual Life Ins. Co. v. James Stinson.

1. **TENDER**—*Must be Without Conditions*.—A tender, to be good, must be offered without annexing any terms or conditions.

2. **INTEREST**—*On Foreclosure Decrees*.—It does not need citation of the statute, or of other authorities, to show that a foreclosure decree draws interest from the date of its rendition.

Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Reversed and remanded with directions. Opinion filed January 30, 1900.

E. PARMALEE PRENTICE, attorney for appellant.

ENOCH J. PRICK, attorney for appellee.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The original decree of foreclosure in this case was before this court, upon appeal by the present appellant, who was complainant below, as reported in 62 Ill. App. 319, and the order of this court reversing that decree with directions was affirmed by the Supreme Court. (174 Ill. 125.)

By such order of reversal the Circuit Court was directed to increase and add to the amount found due to the appellant, certain sums paid by appellant in the matter of tax sales of the mortgaged premises.

The present appellee, Stinson, the maker of the mort-

gage, and defendant, was apparently satisfied to pay everything claimed by appellant except the sums paid by it in the same matter of tax sales, and made a tender of the amount admitted by him to be due to the appellant, before the master in chancery, and afterward in court.

The tender of the money (\$16,972.75) was accompanied by a written statement by Stinson that "this tender is made in full of all money due under the mortgage and the mortgage bond, court costs and attorney's fees, as provided in said mortgage, meaning hereby to tender all money due, or which the defendant, James Stinson, is bound to pay under the bill and proofs in this cause to this date."

The amount tendered did not include the disputed sums paid by appellant in the matter of the tax sales, and appellant refused to accept it under the conditions above quoted, but did offer to receive the same and apply it on account of the indebtedness claimed by it.

The amount tendered at the hearing before the master was subsequently brought into the Circuit Court and the money was ordered to be paid to the clerk of that court, to be received and held by him subject to the order of the court.

After the hearing of the exceptions to the master's report, but before the decree was entered, appellant moved to be allowed to receive the money from the clerk without prejudice to its right of appeal from the decree that might be entered. Thereupon a final decree was entered sustaining the sufficiency of the tender made at the hearing before the master, but finding that the tender was not kept good by the payment into court (until some months later) of the sum tendered, interest was not stopped from running, Stinson was permitted to pay into court an additional sum of \$636.60 as interest on the principal sum of the mortgage from the date of the tender before the master until June 17, 1895, which was the date of the decree. The decree then proceeded to find that the mortgage debt was satisfied and discharged, and appellant's motion to withdraw the money from the clerk without prejudice to its right of appeal was denied.

From such final decree the appellant prosecuted an appeal to this court with the result of obtaining a reversal thereof, as above stated.

After such order of reversal by this court, and in contemplation of the subsequent appeal therefrom by appellee, Stinson, to the Supreme Court, a stipulation was entered into by the parties, whereby the sums so deposited in the Circuit Court were permitted to be received by the appellant on February 21, 1896, without prejudice to either party.

After the Supreme Court had finally settled the dispute by affirming the judgment of this court, appellant applied, in proper form, to the Circuit Court to be allowed interest on the sum deposited in that court by Stinson, from the date of the decree, June 17, 1895, at which time it was deposited, until February 21, 1896, when it was actually paid to appellant, which motion was by the final decree of December 16, 1898, denied. The correctness, or otherwise, of such decision is all that we are asked to review. The question is not a difficult one.

The tender originally made by Stinson before the master was expressly stated as made in full of "all money due or which the defendant, James Stinson, is bound to pay under the bill and proofs" in the cause, and if accepted by appellant under such terms, would have doubtless barred appellant from claiming any more. *Jenks v. Burr*, 56 Ill. 450. Then, afterward, when the money was paid into court, it was done, as the order recites, "in order to get the benefit of the tender" made before the master. This was but a repetition of the terms or conditions under which the tender was first made. A tender, to be good, must be offered to be paid without annexing any terms or conditions. *Pulsifer v. Shepard*, 36 Ill. 513.

The money was not paid into court for the use of appellant, in whose favor the finding was, but was paid to be held by the clerk until the further order of the court, and its receipt by appellant, under a proper application made therefor, was denied by the court—because, presumably, the appellant wanted it without prejudice to its right of appeal.

The appellant might rightfully claim to have all that was its due, without the imposition of conditions of any kind, or else be not debarred from having interest on the sum withheld.

This court, and the Supreme Court, held that the amount tendered and brought into court was not all that appellant was entitled to have, and ordered that to the decree, as entered for the amount paid into court, other sums should be added, and such sums were afterward decreed to be paid and were paid.

But interest between the date of payment into court and the date of its payment to appellant was denied.

We are unable to discover any true theory upon which interest was refused.

It does not need citation of the statute or of other authorities to show that a foreclosure decree draws interest from its date. Now, what has happened to stop interest from running from the date of the decree, June 17, 1895, until it was paid to appellant on February 21, 1896?

We can discover absolutely nothing. The former appeal did not stop it, nor was the right to it in any manner involved in that appeal.

All the interest claimed accrued after the date of the decree that was involved upon that appeal.

That appellant may have received the moneys subsequently paid by appellee, as directed by this court by its former order already referred to, in the matter of taxes, is in no way determinative of the question now involved. It is because the Circuit Court, in decreeing such additional sums to be paid, did not also order this interest to be paid, that the case is here again.

The decree of the Circuit Court will therefore be reversed, and the cause remanded to that court with directions to enter a decree that unless appellee shall, within a short time, to be fixed by the court, pay to appellant the amount, to be arrived at in the usual course of practice and procedure, of interest at the rate of five per centum per annum on the said principal sum of \$15,000, from June 17, 1895, the day

when said sum was paid into court, to February 21, 1896, when, by stipulation between the parties and by order of court, appellant was allowed to withdraw and receive the same, the said mortgaged premises be sold at foreclosure sale, in accordance with the practice of the court and the statutes governing such cases. Reversed and remanded, with directions.

Cudney & Co. v. Anna L. Martindale.

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99	509

1. BILL OF EXCEPTIONS—*Seal an Essential Element.*—A seal is an essential element of validity in a bill of exceptions, and without which it is no part of the record, and can not be looked into by the reviewing court for the purpose of seeing what was excepted to on the trial below.

Appeal from the Circuit Court of Cook County; the Hon. GEORGE W. BROWN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900.

H. S. GEMMILL, attorney for appellant.

HOWARD AMES, attorney for appellee.

MR. JUSTICE FREEMAN delivered the opinion of the court.

We are met at the outset of this case by the objection that the document called a bill of exceptions was not sealed as well as signed by the judge who certified thereto. An inspection of the record, to which we are invited by the appellee's additional abstract, shows that the point is correctly taken. The bill of exceptions was originally signed by the judge November 17, 1898. There is an additional certificate, also signed by the judge, which states that February 18, 1899, the parties appeared before him in chambers, and over the objection of appellee that the judge had no jurisdiction, the addition of a seal was ordered *nunc pro tunc* as of November 17, 1898, to which appellee excepted. This additional certificate is itself without a seal, and none appears upon the original bill.

The case of *Jones v. Sprague*, 2 Scam. 55, is apparently the first case in this State in which the want of a seal—which, under our practice, has come to mean only a scrawl enclosing usually the word “seal”—is held to be a fatal objection to a paper purporting to be a bill of exceptions, and this, too, when the objection is taken on the hearing and not by motion to strike out of the record. In that case, however, there was no signature of the judge, nor even a statement that he had signed and sealed the bill. In *Miller v. Jenkins*, 44 Ill. 443, it was held that without the seal the bill of exceptions is no part of the record and can not be considered, the court then saying that while no very satisfactory reason can be assigned why a bill of exceptions should be sealed as well as signed, still the general assembly has required it, and its will thus expressed must be obeyed; that the statute as imperatively requires a seal to a bill of exceptions as to a deed conveying real estate. The statute requiring the judge “to sign and seal” the exceptions is still in full force and effect. R. S. 1898, Chap. 110, Sec. 60, p. 1213. In *Widows & Orphans Ben. Ass’n v. Powers*, 30 Ill. App. 82, where, as in this case, there was only the signature of the judge without the seal, it was held, by reason of the statute, that the document was not a bill of exceptions such as the law recognizes, although the requirement is spoken of as an antique relic of forensic formality which has outlived its usefulness. To the same effect are *Chicago & W. I. R. R. Co. v. De Marko*, 51 Ill. App. 581, and cases there cited; *City of Sterling v. Grove*, 56 Ill. App. 371; *French v. Hotchkiss*, 60 Ill. App. 580; *Elder v. Bennett*, 79 Ill. App. 335. In several of the cases referred to the objection appears to have been made in the briefs in the case as taken.

Such has been the uniform ruling of this court in this and other districts, and of the Supreme Court, so far as we are advised, unless changed by the case of *Hughes v. City of Momence*, 163 Ill. 535 (541). There the court uses the following language:

“It is objected that the bill of exceptions is not sealed by the judge. It appears to be signed, but no scrawl is

attached as a seal. This objection is purely technical, and if made before the case was taken it would have been necessary to correct it in that regard. It comes too late to make that objection in the briefs on the case as taken."

And again in another case with the same title (*Hughes v. City of Momence*), in 164 Ill., on page 19, it is said :

"The objection is made that the bill of exceptions is not sealed by the judge. What is said in *Hughes v. City of Momence*, 163 Ill. 535, applies to this case."

While these cases do not in terms expressly overrule the previous decisions above referred to, they might seem to state the doctrine that the omission of the seal of the judge from a bill of exceptions is a technical objection which will be considered as waived unless a motion to strike the bill from the record is made before the case is taken. If satisfied that such is the meaning of the court in that case, we should certainly cheerfully follow it, as in duty bound. But it is by no means clear that such construction is intended to be given to the language used, in the absence of a fuller statement as to how and when the objection was made to the reviewing court, and in view also of the fact that such construction would apparently overrule, in effect, all former decisions without so doing in express terms. It has heretofore been held that, lacking a seal, such a document lacks an essential element of validity; is not a bill of exceptions at all; is no part of the record, and can not therefore be looked into by the reviewing court to see what was excepted to by appellant on the trial below (*Miller v. Jenkins, supra*), and that there is no help for the court in that respect except through action of the legislature. This suggestion was made by the Supreme Court in 1867, and still the general assembly has taken no action to change the statute to which, since that time, there has been protesting obedience. *Widows & Orphans Ben. Ass'n v. Powers, supra*. If the facts were so stated in *Hughes v. City of Momence* as to leave no doubt that it was intended to hold that the want of seal would be considered waived when not made before the case is taken by the reviewing court, we should gladly follow

the ruling. As it is we deem it prudent, until the Supreme Court otherwise advises us, to adhere to the former rulings of this court hereinbefore referred to, that we may not unwittingly mislead the bar, and that vigilance in respect to formalities required by the statute may not meanwhile be abated.

There are other cases which may be considered as bearing upon the question before us. Such are *Myers v. Phillips*, 68 Ill. 269, and *Hyde Park v. Dunham*, 85 Ill. 569 (571). It was held, in the first of these cases, that where a motion had not been made to strike out an amended bill of exceptions claimed to have been unauthorized, as not properly a part of the record, the court would not do otherwise than regard the amendment as rightfully made, and would treat it as part of the record. To the same effect is *Village of Hyde Park v. Dunham*, 85 Ill. 569 (571), where it did not affirmatively appear from the record when the bill of exceptions was signed and sealed. No motion to strike it out having been made at the proper time, it was presumed to have been filed in time and regarded as rightfully a part of the record. Cases of this character, however, differ from those where the bill of exceptions has not been sealed, in that the latter fail to comply with a statutory requirement, which has been held to be imperative. *Miller v. Jenkins*.

The absence of the seal of the court from the certificate of the clerk to the transcript of record has been held to be fatal. *Cowhick v. Gunn*, 2 Scam. 418; *Mason v. Gibson*, 13 Ill. App. 463 (466). In *Morse v. Williams*, 4 Scam. 285 (286), cited in *Mason v. Gibson*, it was held that not being properly certified for want of seal to the transcript, the case was not in court, and the motion to strike out was sustained, although not made until after joinder in error.

If, however, we considered the evidence as presented in the so-called bill of exceptions, we should find it so conflicting that we should be compelled to regard the verdict of the jury as settling the question of fact. *Cudahy v. Powell*, 35 Ill. App. 29. It is said in *East v. Crow*, 70 Ill. 91 :

"The evidence is conflicting, and there may be some doubt as to the correctness of the finding, but on the whole we are not prepared to say the jury did not arrive at a correct conclusion."

Such would doubtless be our view if we could consider the supposed bill of exceptions. In either event, therefore, we should be compelled to affirm, as we do, the judgment of the Circuit Court.

Richard C. Gunning v. The People, etc.

1. **BRIBERY—Of Town Assessor.**—In order to charge an assessor of a town with the crime of proposing to receive a bribe to reduce an assessment, it is necessary that the indictment should allege that the property upon which the assessment is proposed to be reduced is within the town for which he is the assessor.

2. **JUDICIAL NOTICE—Of Towns in a County.**—It is a matter of judicial cognizance that both the original town of Chicago and the town of South Chicago are situated in Cook county, and judicial notice may also be taken by the boundaries of each one of such towns, created, as they were, by acts of the legislature of the State.

3. **SAME—Situation of Lots and Blocks in a Town.**—A court may take judicial notice that an alleged lot and block are situated within that part of the original town of Chicago which is within the south town, and not in either the north or west town of Chicago.

4. **INDICTMENT—Allegations of Intent.**—If a statute creating an offense is silent concerning the intent, there need be no intent alleged in an indictment for an offense under it.

5. **INTENT—In Criminal Acts.**—Where an act is criminal in its very nature, it is *prima facie* evil in intent, and the intent need not be alleged unless the law has made it affirmatively or descriptively an element in the offense.

Error to the Criminal Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1899. Affirmed. Opinion filed January 30, 1900.

EDWARD H. MORRIS, attorney for plaintiff in error.

CHARLES S. DENEEN, State's Attorney, for defendant in error; WILLARD M. McEWEN, Assistant State's Attorney, of counsel.

MR. JUSTICE SHEPARD delivered the opinion of the court.

The plaintiff in error was indicted, tried and convicted, and a fine of \$3,500 was imposed upon him, and this writ of error to review the proceedings against him has been sued out.

The indictment, shortly stated, charges the plaintiff in error with having corruptly solicited a bribe to influence his official action, as assessor of the town of South Chicago, in the matter of reducing the assessment, for the year 1897, upon the following described real estate, to wit:

“Lot one of the assessor’s re-subdivision of sub-lots one to five of the assessor’s division of lots one to five, in block fifty-eight, of the original town of Chicago, together with the building thereon, commonly known as the Reliance building, and the other improvements, all in said county of Cook, in the State of Illinois aforesaid.”

There are numerous counts in the indictment, but the description of the property is the same in all, with an addition in some of them as to its ownership.

Appropriate motions and exceptions were made and preserved in the trial court to require a consideration by us of all questions we shall pass upon.

The facts, as charged in the indictment, that plaintiff in error was the assessor for said town of South Chicago, at the time alleged, is not controverted, nor that the statute provides for the punishment by fine not exceeding \$5,000 for the offense charged, in case of conviction therefor.

The point that it is not shown by the allegations of the indictment that the property, concerning which it is alleged the plaintiff in error proposed to accept a bribe to influence his official action, is situated within the town of South Chicago, has been urged upon us with much ability and persuasiveness, and has caused us considerable hesitation.

It must be admitted, and counsel for the people do substantially concede, that in order to charge an assessor of the town of South Chicago with the crime of proposing to receive a bribe to reduce an assessment, it is necessary that the indictment should allege that the property upon which the assessment is proposed to be reduced is within the town of South Chicago.

The indictment locates the particular property in "Block fifty-eight of the original town of Chicago," in the county of Cook.

Unquestionably it is a matter of judicial cognizance that both the original town of Chicago and the town of South Chicago are situated in Cook county, and judicial notice may also be taken of the boundaries of each one of such towns, created, as they were, by acts of the legislature of the State. Judicial notice may also be taken of the boundaries of the various other towns under township organization in Cook county, and we are bound to know, therefore, that the original town of Chicago includes parts of the, at present, three distinct towns of South Chicago, North Chicago and West Chicago, and, with nothing else to aid the indictment, the alleged lot and block may as well be situated in the north or west town as in the south town.

Whether we may go further and take judicial notice that the alleged lot and block are located within that part of the original town which is within the south town, and not in either the north or west town, is the question.

It is said, in 1 Greenleaf on Evidence (13th Ed.), on page 10, that "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction," and, in note 5 on the same page, it is said :

"There is not much consistency in the cases, and possibly this may result from the fact that different judges may assume that what is or is not known to them is or is not generally known."

It is said in *Harmon v. City of Chicago*, 110 Ill. 400 (on page 413), that the court "may, of its own motion, take judicial notice of what is generally known" with reference to the proximity of the bituminous coal fields of the State to the city of Chicago, and of the use that is made of soft coal in the manufacturing industries of that city. And again, in the comparatively recent case of *Sever v. Lyons*, 170 Ill. 395, it was held, in the language of the court :

"Where the person entitled to homestead is the owner of more than one lot, the court will take judicial notice of the subdivision of the town and city property into separate

Gunning v. The People.

blocks and lots, for the purpose of determining what lot of land is covered by the exemption," citing a similar holding in *Gardner v. Eberhart*, 82 Ill. 316.

We are not at liberty to disregard what seems to be so plain a holding by the Supreme Court, that, in order to determine the location of a lot of land for one purpose, judicial notice will be taken of a subdivision into blocks and lots of town or city property, and ourselves hold that for the determination of the location of a lot and block for another purpose such notice can not be taken. It may be also said that reasonable certainty in the description of the property, with respect of which the punishable offense was committed, is all that is required. Too much nicety and strictness in such respect tends more to the evasion than the investigation of the real offense. *White v. People*, 179 Ill. 356.

It was proved that the particular real estate in question is situated within the south town, and though such proof could not of itself aid the indictment, we must hold, in view of what we have said, that the proof and the allegations corresponded in respect of the property described in the indictment.

There is, however, another view of the indictment, which the majority of the court are of opinion aids it. The charge is in effect that the plaintiff in error, as assessor, solicited a bribe for the violation by himself of an official duty. Such official duty could be violated by him only in connection with property concerning the assessment of which he could officially act, and hence, only concerning property situated within the town for which he was assessor. Such charge is thought to be equivalent to a charge that the property was situated in the town of South Chicago, for which he was the assessor.

It is next said that the indictment is defective in failing to charge the intent.

The specific section (32) of the Criminal Code, under which it seems to be agreed the plaintiff in error was indicted and tried, does not mention the element of intent

with which a bribe shall be solicited or agreed to be received.

Bishop, in his work on Criminal Procedure, Vol. 1, Sec. 523 (3d Ed.), says that, subject to exceptions referred to by him, "the rule is, that if a statute creating an offense is silent concerning the intent, there need be no intent alleged in the indictment." See also *McCutcheon v. People*, 69 Ill. 601.

Doubtless, wherever the statute makes the intent an element of the offense it must be alleged, and this is particularly true where an act is innocent in its nature, but becomes criminal by reason of some accompanying evil intent in its doing. But where an act is criminal in its very nature it is *prima facie* evil in intent, and the intent need not be alleged, unless the law has made it affirmatively or descriptively an element in the offense. 1 Bishop, *Crim. Proc.*, Secs. 521-525.

Here, although the evil intent with which the alleged solicitation of a bribe is not, in so many words, alleged, it is involved in the allegations of the indictment, and is inferable from the indictment as a natural and legal consequence of the act of soliciting a bribe that is alleged.

The remaining points, that the proof failed to support the allegations of the indictment and that error was committed in the giving of instructions to the jury, may be considered together, for they are closely related.

The indictment charged in effect that the thing proposed to be done by the plaintiff in error, for the bribe proposed, was to reduce the assessed valuation on the described premises from \$100,000 to an assessed valuation of \$91,970.

It was proved that the assessed valuation as returned to the county clerk was \$100,000, and though there was other evidence, in the written memorandum furnished by plaintiff in error and the testimony of Fellows, that the alleged corrupt proposal had reference to reducing the assessed valuation from \$130,000 to the amount of \$91,970, which was the assessed valuation for the previous year, we can not say that the jury were not justified in finding that the charge was

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proved as laid in the indictment. The really material part of the charge was that in consideration of the payment of the proposed bribe the assessed valuation of the property would be reduced.

True, the conversation in which the alleged corrupt proposal was made was, in its most particular part, explicitly denied by two witnesses produced in behalf of the plaintiff in error, and was supported by only one witness in behalf of the State, but it was for the jury to say which, if any, of the witnesses were unworthy of belief, and their verdict having been sanctioned by the trial judge, who saw and heard the witnesses, and observed their manner of testifying, it is not permissible for us, for anything appearing in this record, to set aside the verdict.

The instruction that is complained of was based upon the theory that there was evidence of a proposal by the plaintiff in error to reduce the assessed valuation to the sum of \$91,970, and, in view of what we have said, the instruction was not erroneous.

Having considered the entire record we are unable to say wherein any substantial error has been committed, and there remains for us nothing but to affirm the judgment, which is done accordingly. Affirmed.

J. B. Sanborn Co. v. Marquette Building Co., Owen F. Aldis, Central Chicago Building Co. and Charles and Jeannette Schonlau.

1. *TENANT—Recovery for an Unwarranted Interference with his Possession.*—An action will lie for an unwarranted interference with the possession and enjoyment of a leasehold estate.

Appeal from the Circuit Court of Cook County; the Hon. JOHN C. GARVER, Judge, presiding. Heard in this court at the March term, 1899. Reversed and remanded. Opinion filed February 5, 1900.

Statement.—This is a suit brought by appellant against appellees to recover damages for an alleged interference

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with appellant's enjoyment of premises demised to it. By written lease of May 11, 1889, the Central Chicago Building Company, one of appellees, leased to appellant room 41, situated on the fifth floor of the Honore block, Chicago, to be used for office purposes, and for no other purpose, from May 15, 1889, to April 30, 1893. At the time this lease was made, and for many years prior thereto, the Honore block was kept and operated as an office building, and was occupied by lawyers, real estate men and others for office purposes. The plaintiff is a mercantile and collecting agency. In the latter part of 1899 the defendant, the Marquette Building Company, became owner of the building and continued to be owner down to and including the time of the occurrences complained of in the declaration. The building was used as an office building from the time appellant's lease was made until about May 1, 1892. By a written lease, dated April 23, 1892, between the Marquette Building Company, lessor, and Charles and Jeannette Schonlau, lessees, the Marquette Company leased the entire building to the Schonlaus, to be occupied for ordinary business purposes and for a first-class hotel, and for no other purpose, from May 1, 1892, to May 1, 1893, and for a first-class hotel, and for no other purpose, from May 1, 1893, to October 31, 1893. Said lessees were authorized to make such reasonable alterations as should be necessary to prepare the building for use as a hotel or lodging house; but no changes were to be made unless approved in writing by Aldis, Aldis & Northcote. This lease was made subject to thirty-five enumerated leases, among them the lease to appellant. The Schonlaus were to receive the rents accruing on these thirty-five leases. This lease was signed by the Marquette Building Company, by Owen F. Aldis, its president.

Pursuant to this lease the Schonlaus took possession of the building, and shortly after May 1, 1892, began to make alterations to fit up the building for hotel purposes. The alterations continued during the months of May, June and July, and were completed about August 1, 1892, under the direction of the Schonlaus. The main entrance on Dear-

born street was changed into a hotel office. It took about thirty days to make the change, during which time that entrance was obstructed part of the time by scaffolding, piles of lumber and plaster, so that access through it was difficult, and for a portion of the time it was impossible to get through this hall. The elevator at the main entrance was closed part of the time. The bulletin board, containing a list of tenants, was taken down. There was a side entrance on Adams street, where there was an elevator used for both freight and passengers. During the alterations this elevator was run only a part of the time. When it was not busy with freight it carried passengers, but when the building was being turned into a hotel, this elevator was busy with freight. Part of the time the Adams street entrance was obstructed. When the alterations were completed this entrance was used as a ladies' entrance to the hotel.

At the time the hotel was being furnished the halls were obstructed by furniture. On one or two occasions this furniture was piled up against appellant's office door, so as to entirely close it.

In August, 1892, the hotel was opened for business, and on September 21, 1892, appellant moved out of the building.

Appellant presented evidence tending to show loss and injury by reason of the changes in the building and the obstruction of the halls and entrances. It claimed, among other items, loss occasioned by expense for new stationery after moving into new offices, the difference in rent which it was obliged to pay for the new offices, and a general loss of profits in its business.

The issues were tried with a jury, and at the close of the evidence for the plaintiff, appellant here, the court peremptorily directed a verdict for appellees. From judgment upon that verdict this appeal is prosecuted.

CHARLES P. ABBEY, attorney for appellant.

BENTLEY & BURLING, attorneys for appellees.

MR. PRESIDING JUSTICE SEARS delivered the opinion of the court.

This suit was brought in an action on the case. The fourth ground urged for granting a new trial below, and the fourth assignment of error here, present the same objection, viz., that the court erred in directing a verdict for defendants, appellees Charles and Jeannette Schonlau. We are of opinion that the contention of appellant in this regard must be sustained.

The question of whether the interferences with the possession of appellant amounted to an eviction, is not necessarily here involved. The directing of a verdict for appellees raises the broader question of whether there has been such an interference as would constitute ground of action against any of the appellees, whether it amounted to an eviction or not. The action, so far as it can be sustained, is not based upon any breach of covenants of the lease, or upon any contractual ground whatever, but upon an unwarranted interference with the possession of appellant. Inasmuch as the evidence fails to disclose any act upon the part of the Central Chicago Building Company, the Marquette Building Company, or Owen F. Aldis, which could be construed as an interference with the possession of appellant, and as no action upon contractual obligation is here involved, the ruling of the court, in directing a verdict of not guilty as to these appellees, was proper. But while the court was warranted in thus directing a verdict for the three appellees named, it was error to direct a like verdict for appellees Charles and Jeannette Schonlau, for the evidence shows that they did cause the acts to be done by which the appellant claims to have been injured. Nor does the right to a recovery depend alone upon the right of the Schonlaus to make alterations in the building or to change it in part into a hotel. Although the contract of leasing, to which the Schonlaus became party, imposed no limitation upon the lessors by which they were precluded from using a part of the premises for a hotel, and making such changes as were incident thereto and necessary, yet a recov-

ery might be had for any wrongful invasion or interference with appellant's rights in the premises, done in the course of reconstruction of the building. That an action will lie for such unwarranted interference with the possession and enjoyment of a leasehold is well settled. *Chapman v. Kirby*, 49 Ill. 211; *Glickauf v. Maurer*, 75 Ill. 289.

The trial court should have submitted to the jury the question of injury to appellant through such acts, if any, of appellees Schonlau.

It is urged by appellant that there is as well a right of recovery against the other appellees. This contention is not tenable. There is no evidence to show that the work of reconstruction was participated in, or the method of accomplishing it authorized, affirmed or ratified by any of the other appellees.

The permission given to the Schonlaus, by the contract of the Marquette Building Company, to alter the building into a hotel, was made expressly subject to the thirty-five leases of tenants, including appellant. There is no evidence to show that this company or Aldis ever approved in writing of the plans of reconstruction, or had any knowledge or notice of the acts by which the reconstruction was accomplished.

We do not regard the cases cited by counsel for appellant in this behalf as being in point. They are decisions in cases where it was either sought to defend in actions for rent or to recover damages for breach of a covenant of the lease; in each case the defense or the action being based upon the contract.

The language of this court in *Mendel v. Fink*, 8 Ill. App. 378, Mr. Presiding Justice McAllister speaking, is applicable to the case under consideration:

"A liability upon contract, express or implied, being excluded from the consideration of the case, then the question arises, what circumstances should be shown in order to fix the landlord with responsibility for the damages in question?
* * * If, however, they (the premises) were not under his management, or that of his servants, but were under the management of a tenant or tenants, and the latter made

negligent use of them, the landlord would not be responsible. The basis of a liability in the absence of a contract must, therefore, be laid in some act of malfeasance on the part of the landlord, or negligence in him or his servants, resulting in the injury." *Greene v. Hague*, 10 Ill. App. 598.

We are of the opinion that in directing a verdict of not guilty as to appellees Central Chicago Building Company, Marquette Building Company and Owen F. Aldis, the ruling of the trial court was proper, and that in the directing of a like verdict as to appellees Charles Schonlau and Jeannette Schonlau there was error. Therefore the judgment is reversed and the cause remanded. Appellant will recover its costs in this court against appellees Charles Schonlau and Jeannette Schonlau. Reversed and remanded.

William Skakel v. The People, etc.

1. APPELLATE COURT JURISDICTION—*Constitutional Questions*.—The Appellate Court has no jurisdiction of questions involving the validity of a statute or the proper construction of a constitutional provision.

Error to the Criminal Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding. Heard in this court at the March term, 1899. Dismissed for want of jurisdiction. Opinion filed February 5, 1900.

W. A. FOSTER, attorney for plaintiff in error.

CHARLES S. DENEEN, State's Attorney, for defendant in error; A. C. BARNES, Assistant State's Attorney, of counsel.

MR. JUSTICE ADAMS delivered the opinion of the court.

At the July term, 1897, of the Criminal Court of Cook County, plaintiff in error was indicted for operating a tape machine, in violation of section 1 of an act in force June 21, 1895. 1 S. & C.'s Stat., Crim. Code, par. 266. At the same term he was admitted to bail. At each of the July, August, September and October terms, 1898, he appeared

Skakel v. The People.

in court on the first day of the term, in person and by his attorney, and demanded a trial, which was not granted. Plaintiff in error was tried and convicted at the November term, 1898, of the court. Before the trial commenced he filed a plea which his counsel calls a plea in abatement, which is, in effect, a motion for his discharge on account of delay in bringing him to trial, and which the court overruled. He has assigned as error the overruling of this plea or motion, and also the refusal of the court to discharge him at the November term, 1898. The statute in relation to the trial of persons indicted for criminal offenses and admitted to bail, is as follows :

“ If any such person shall have been admitted to bail for an alleged offense other than a capital offense, he shall be entitled, on demand, to be tried at some term commencing within four months after he has been admitted to bail, if there is a term of court within that time at which he may be tried; if not, then at the first term after the expiration of said four months; *Provided*, that if the court shall be satisfied that due exertions have been made to procure the evidence on behalf of the people, and that there is reasonable ground to believe such evidence may be procured at the next term or at some term to commence within seventy days thereafter, the court may continue the cause to such term.”

Counsel for plaintiff in error contends that this statute is unconstitutional, in that it is contrary to the provision of the Constitution declaring the right of one accused of a criminal offense to a “speedy public trial.” The question of the proper construction of this provision of the Constitution is argued by counsel for plaintiff in error. The question of the validity of the statute and also the question of the proper construction of the constitutional provision referred to, are also argued by counsel for the people. These questions being involved, and we being without jurisdiction to consider and decide them, the writ of error will be dismissed. Writ of error dismissed for want of jurisdiction.

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